IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

DAVID WOOD, Plaintiff v. CREDIT ONE BANK, N.A., Defendant	)	Civil Action No. 3:15CV594 January 11, 2018

COMPLETE TRANSCRIPT OF FINAL PRETRIAL CONFERENCE
BEFORE THE HONORABLE M. HANNAH LAUCK
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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DIANE J. DAFFRON, RPR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT

(The proceedings in this matter commenced at 1:17 p.m.)

THE CLERK: Case No. 3:15CV594, David William Wood versus Credit One Bank.

The plaintiff is represented by Leonard Bennett and Craig Marchiando.

The defendant is represented by Bryan Fratkin and Heidi Siegmund.

Are counsel ready to proceed?

MR. BENNETT: The plaintiff is, Your Honor.

MR. FRATKIN: The defendant is, Your Honor.

THE COURT: All right. Could you all please be sure that you put on the record who's at counsel table with you.

MR. BENNETT: For the plaintiff, Leonard Bennett, Craig Marchiando, and David Wood, our client.

MR. FRATKIN: Your Honor, Bryan Fratkin, Heidi Siegmund, and this is David Bouc, who is the general counsel for Credit One.

THE COURT: All right.

So we're here to go over the issues we need to address for purposes of the final pretrial conference. Let me just say initially, you both were courteous to stand as I was addressing you, which is what we normally do in the court. We're going to be

dealing with a lot of documents today, and so feel free just to argue carefully into the microphone, so my court reporter can hear you, for purposes of today's hearing.

All right. So I'm going to start with the motions in limine, and there are quite a few of them. I want to confirm that I have what you all want me to have. As I see the record, Credit One has filed four motions in limine: One on willfulness, ECF No. 120; one on causation, ECF No. 123; one about loans, ECF No. 127; and lost wages, ECF No. 130.

That's what you filed; is that correct?

MR. FRATKIN: That's correct, Your Honor.

THE COURT: All right.

Now, Mr. Wood initially had filed ECF No. 122 with respect to handling of factual matters. It's my understanding that that has been withdrawn; is that correct?

MR. BENNETT: That is correct, Your Honor.

THE COURT: But there is an omnibus motion in limine, and I count, essentially, ten -- well, more than that, but 10 separate motions within that, ten separate issues, although issue six has subparts, and I just want to confirm that at least three of those are not objected to or are essentially withdrawn or

agreed to.

MR. FRATKIN: Your Honor, do you want me to confirm?

THE COURT: Yes. I have them numbered.

MR. FRATKIN: Seven, eight, and eleven.

THE COURT: Right.

MR. FRATKIN: Are the ones that are --

THE COURT: I wanted to make sure that the numbers I used would comport with your counting of them.

MR. FRATKIN: Right.

THE COURT: Yes. I have that there's no objection essentially to the issues set forth in seven, eight, and eleven.

MR. FRATKIN: Correct.

THE COURT: Both parties are in agreement as to that?

MR. BENNETT: Yes, Your Honor.

THE COURT: All right. So I tried to look at these in a manner that I think will expedite or in consideration of all the issues, and so I'm going to go straight to Mr. Wood's motion, which I have labeled 6C, which is the motion to exclude the CDIA documents. So I'm going to hear both parties with respect to that. And you can catch up with me. I know I'm

taking things out of order.

MR. BENNETT: Judge, the documents at issue, the easiest and most important basis is to exclude them pursuant to Rule 37(c)(1) and Rule 36(e), which requires timely supplementation.

These documents were not produced to us until, by my email count, November 21, 2017. This was, of course, after discovery was closed in June of 2016, and it was after we had locked in our positions that we would take in the case.

We did not subpoena the documents from the CDIA. Of course, we couldn't have seen those for the second reason that I'll argue. They didn't exist.

THE COURT: Let me stop you. Exactly what volume and type of documents are we talking about?

MR. BENNETT: The document itself, which I can pull up if the Court wants to look at it --

THE COURT: What was turned over on November 21?

MR. BENNETT: There was an email that was sent to us, if the Court would permit me, and that email just said, "Please find attached," and it had this document in it.

May I approach, Your Honor?

THE COURT: Mr. Melton.

MR. BENNETT: We've had a number of discussions. The Court is probably very certain that I am familiar with both of my new opponents. I have tremendous respect for them in and out of the courtroom. And there have been a number of gotcha opportunities that both sides have had and have not exercised. So there are some objections we could have asserted as to timeliness of document not included in the original exhibit list or otherwise. You're not seeing any of those from either side. You are seeing substantive complaints and challenges and objections. And this is absolutely one of them.

This document itself purports to be a change that the CDIA made in 2017 to the way that the compliance condition code would be used and it's a document that, if the Court would permit me, it's on the screen. It's Defendant's Exhibit 13. And, of course, we have had significant litigation against the credit bureaus in other cases and significant third-party discovery against the credit reporting agency owned, controlled, and operated CDIA from which this document was apparently generated.

I represent to the Court I have never seen this before. It was brand new. If you look on the screen, you will see at the bottom the document even

says, "In advance of the 2017 Credit Reporting Resource Guide."

Exhibit 8 has been updated. Credit One is a significant customer of the credit reporting agencies, what's called a strategic customer. I have never personally seen the credit reporting agencies do an in-the-middle-of-the-year addendum to change a code which is so clearly focused on just the single issue that this court considered in the opinion.

So it's new to me. Obviously, it's not even -- it was sent out even when it was not in the 2017 reporting guide yet. We have no explanation from the defendant as to how it got this. I have no knowledge, not technical, not real, not any knowledge about where this came from that's outside the email the Court is holding in its hand. That is -- and I've not seen it from any other creditor, the credit reporting agency, or our copy of the Credit Reporting Resource Guide.

Certainly, to the extent that discovery were open and we had plenty of time for this many year old case, I would go right to the CDIA and begin to depose these people. The individuals that make the decision there are all at each of the credit bureaus. So we would be traveling to Atlanta and to Chicago where

TransUnion is, and to Costa Mesa where Experian is to find out how this came about.

Independent of the Rule 37(c)(1) standards which we addressed, there's no substantial justification for this, and it's certainly not harmless.

It's irrelevant under -- because -- under the Federal Rules of Evidence because this was not the standard at the time that any of the disputes were made by the plaintiff. It is not evidence because whether or not this is the standard for the credit reporting agencies at a moment does not change the fact that both the Fourth Circuit in *Saunders v. BB&T* and the Third Circuit in *Siemens v. Temple University* have both held that you have to note an account is disputed when it's still disputed. And what a code definition charge that occurs in November of 2017 does doesn't change that legal reality. The reporting would remain inaccurate and incomplete. The response to the dispute incomplete because it was disputed regardless of what instruction the credit reporting agencies would empower a furnisher with in Thanksgiving of 2017.

THE COURT: All right. So, Mr. Fratkin, why don't you tell me why you sent or Ms. Siegmund sent

the November email and included this document and under what procedural mechanism you were doing so.

MR. FRATKIN: Thank you, Your Honor. I'll take this one, and Ms. Siegmund and I will be splitting off, but this one is mine.

To begin, to address the Rule 37 issue, this document, as the date reflects, wasn't available until March 2017. And if you look at the timeline for this case, the Court had indicated it was going to grant plaintiff's motion and deny the defendant's in November of 2016. So before the document even existed.

And then there was a period from November 2016 until when the Court ultimately issued its summary judgment opinion where the compliance condition codes, which are the subject of this document, were really written about in Your Honor's opinion. That was the end of September 2017.

We, McGuireWoods, or Ms. Siegmund and I then got involved in the case, and this is a document that Ms. Siegmund actually Googled and found. We talked to our client about the document. It was a document that it was aware of, too. And produced it really once we sort of got our arms around this case in November 2017.

And so in terms of the timing of when we produced it, you know, it was well after the discovery period ended, of course, but the document didn't exist at that point in time. And from November of 2016 to September of 2017 nothing happened in this case. We were all just waiting on Your Honor's opinion.

And so that's the reason for the delay in producing it, which I think is justifiable in this case.

In terms of the substance of the document on the relevance, it's a four- or five-page document. So it's not as if we dumped a giant load of documents on the plaintiff at that time.

And the relevance, in our client's view, this is not a change in what the reporting requirements were. This was consistent with what our client was doing all along, and that's why we want to use it. Our witness, Ms. Lanham, will testify that it confirmed the existing procedures and policies that the bank already had in terms of how it reported accounts in dispute. Primarily that the XH code -- well, the client's position was that the XH code was the appropriate code to report because it indicated that the furnisher had looked at the dispute and there was no other code to indicate that.

This document actually clarifies all that and says, Don't use any of the compliance condition codes when the dispute comes in from the furnisher. So we want to use that for purposes of the willfulness --

THE COURT: So, Mr. Fratkin, you sent an email, and what was the procedural mechanism that you -- discovery was closed. You don't deny you know discovery was closed.

MR. FRATKIN: Correct, Your Honor. I mean, we supplemented our document production because of the --

THE COURT: But you don't say how or why you are supplementing your document production after the close of discovery.

MR. FRATKIN: Well, our email to Mr. Bennett said the production includes guidance that Credit One Bank received from the Consumer Data Industry Association in early 2017 clarifying the use of compliance condition codes in Metro 2. That was the email.

We got a response back from Mr. Bennett that said he objected to the production of the document. He appreciated our -- I think the email said he appreciated our supplementation of discovery, as required by the rules, but that he was going to object

to the production of the document.

So discovery had closed when the document was created as well. I mean, I think we were doing what we thought was the right thing to do, which is we had a new document that we thought was relevant to the case, and, of course, we were going to produce it as soon as we became aware of it.

THE COURT: Right. But you're not just going to produce it. You're going to rely on it in trial.

MR. FRATKIN: And in our briefing, Your Honor, we offered a supplemental deposition of Ms. Lanham.

THE COURT: At whose cost?

MR. FRATKIN: Pardon me?

THE COURT: At whose cost? Yours?

MR. FRATKIN: We didn't get that far, but we're happy to pay for that if that's what allows this document to get in.

THE COURT: So, Mr. Fratkin, what am I supposed to do with the fact that while you say you think you're doing the right thing, it doesn't -- the issue does not come to me until three weeks before trial? Why doesn't that rest on you if you want to use it at trial? I've never seen it before. This issue came to me as part of this final pretrial

conference.

So you brought it to the attention of the other side, but you're the one who's trying to adduce evidence beyond discovery, not them.

MR. FRATKIN: Your Honor, understood. And I think from our perspective, when we sent it over to Mr. Bennett and he said he appreciated our supplementing under the rules, I think, in our view, trying to work things out between the parties and not bring that type of issue before the Court was the approach we took.

I understand the Court's concern, though, that now we're butting up against the trial date.

THE COURT: We're at the trial date. And what you are offering is a cure of a deposition that would move the trial date. In fairness, that's --

MR. FRATKIN: We could certainly try to get the deposition. I think it's not offered for much other than for Credit One to confirm that this document is consistent with the way it viewed its reporting requirements all along.

THE COURT: So then why isn't it cumulative?

MR. FRATKIN: Because the Court has already found as a matter of law that investigation we did was unreasonable, and what we're trying to show is that

there's guidance out there that is consistent with Credit One's interpretation of the statute. And it's certainly the previous version, the 2011 version of this document, has not been objected to but doesn't clarify the issue as much as this document does. And so I think --

THE COURT: So --

MR. FRATKIN: It's relevant to --

THE COURT: But what does it go to that the jury has to decide?

MR. FRATKIN: I think that the jury understands that there's guidance out there that has since clarified what the issue is. It will -- I mean, Mr. Bennett, for example, is trying to get into the *Johnson v. MBNA* decision, the *Saunders v. BB&T* decision. Those are decisions that he wants the jury to go back and review. And this is additional guidance that Credit One considered that I think would be helpful to the jury to understand the way in which it reported and understood to be reporting disputes.

THE COURT: To what end? What element of a claim or defense does that go to?

MR. FRATKIN: I think it goes, Your Honor, to whether Credit One's conduct was willful. The evidence about how it understood to report disputes is

directly addressed by this document.

THE COURT: How is that not bolstering if it didn't exist at the time that you made the decision or cumulative?

MR. FRATKIN: I think it clarifies what our decision was already.

THE COURT: It bolsters it. You're looking to have a third-party presentation about a decision that you made that was presented after it was made.

MR. FRATKIN: That clarifies what our position was already, not changes our position. But I understand the bolstering point, Your Honor.

We think it's probative, but there's certainly an argument that it didn't exist at the time.

THE COURT: Well, it's not an argument. It didn't exist at the time.

MR. FRATKIN: You're right. And therefore it shouldn't be admissible. I understand that argument.

THE COURT: Is there anything you want to say, Mr. Bennett?

MR. BENNETT: Yes, Your Honor. Just the suggestion that the document was created and in the defendant's possession in March and was known to its counsel here in September and not produced until the

end of November kills any argument that could be made about substantial justification.

With respect to the proposed remedy of taking their 30(b)(6) deponent's deposition again, we took it. She didn't know about any of this at that time in that deposition.

THE COURT: So you're going -- I'll tell you, both of your motions are very sweeping. You're terrific advocates. You are a little too advancing of broad propositions, both of you. So I'm going to ask you during this pretrial conference to be specific about what you claim someone did or did not know and why.

So if you say she didn't know about any of this stuff, you're going to have to be specific so that in fairness Mr. Fratkin can say, Yes, she did, and then you can say, Oh, well, that's not enough. Because I actually think that's more of what's going on here than the broad sweeping propositions both sides have given me.

MR. BENNETT: And I apologize. In fact, it's worse than that. The basis is my overconfidence in my memory.

So I hold the memory that having tried to flush out any specific knowledge that I was unable to

find it. And I cannot swear that I've reviewed every page of a transcript to find that.

I will note that --

THE COURT: Any specific knowledge of --

MR. BENNETT: Of the compliance condition code. The process for deciding how to use a compliance condition code. Just like testimony from Ms. Lanham. She wasn't offered as their deponent on how did you determine what your procedure would be. That was a gentleman named Mr. Shutt, a former lawyer that no longer worked there.

So I would also, though, say the document itself, this is page two of it, I believe, that we object to. If you see the bold section under XB, it says, "Important note. Code XB should no longer be reported after the investigation is completed," which the bold is the change that was made, and that refers to a change to what should have been done in the past.

To the extent that the defendant's substantive defense of its bolstering right would be this merely confirms that what they were doing before complied with the CDIA requirement, to the extent that's relevant, it's also wrong because the CDIA document the defendant now seeks to use says it's different today than it was during the time that the

case facts occurred.

Lastly, with respect back to the 37(c)(1) remedy, the deposition of the defendant would be inadequate. We would need to have an expert now because the defendant would now be asserting an industry standards defense. I'm unaware of that having been previously successful in any Eastern District case, but we would have to be concerned enough that we would need to find somebody, and we would need to depose the CDIA representatives who made this change, principally the representatives from the big three credit reporting agencies. It's not a matter of let's just fly this person in here next Sunday at their airfare expense. It's a significant undertaking, to the extent that the Court would find it relevant, that in 2017 the CDIA sent out this piece of paper to its customers.

MR. FRATKIN: Your Honor, may I just respond to a couple points?

One, Mr. Bennett said that we knew about it in September and then didn't produce it until November. If I suggested that, I didn't mean that. We got involved in the case shortly after the opinion came out in September, but it took some time to get our hands around this. I don't know the exact date

that we became aware of this 2017 document, but it certainly wasn't right when the case came out.

The second point, on our 30(b)(6) witness's testimony, this is from the transcript.

THE COURT: So where and --

MR. FRATKIN: Certainly. This is page 43 of Ms. Lanham's testimony. So turning to Bates No. 66, "Have you seen this document before?" Answer: "Yes, I have."

THE COURT: I'm sorry. You know what? I'm pulling up documents, and you pulled it out before, and I don't have it yet. So slow down, please. What page?

MR. FRATKIN: Page 43.

THE COURT: All right. Thanks.

MR. FRATKIN: So page 43 in the middle of the page, Ms. Rotis asked Ms. Lanham -- and this document is called the 2011 Credit Reporting Resource Guide. This is the prior version of the 2017 one.

"Is this the Credit Reporting Resource Guide that was in use at Credit One Bank at the time of the disputes that are the subject of this case?"

"Yes, it is."

"How did you come about getting a copy of it?"

"I received it from our compliance department."

And then the deposition, several pages, goes on about the various codes, and so for Mr. Bennett to say that our witness didn't know about this Credit Reporting Resource Guide, of course she didn't know about the 2017 one at the time of the deposition because it was before it existed, but to suggest that our client wasn't aware of these guides is just wrong. Ms. Lanham testified that this was the guide that the company used.

MR. BENNETT: Judge?

THE COURT: Uh-huh.

MR. BENNETT: So the substantive testimony after the pages of objections I believe starts at page 47.

THE COURT: Uh-huh.

MR. BENNETT: And it's just this particular witness saying that they believe they downloaded the Credit Reporting Resource Guide from the Internet, and that their official policy, which is at page 48, line 10, "Do you have any specific policies that are based on information from the Credit Reporting Resource Guide?"

"Yes. The policies related to ACDV

processing or instructed by the Metro 2 format."

I mean, I'm unfamiliar -- I mean, I don't -- the first time they mention a compliance condition code is on page 50, line 14, and then page 51. There's nothing in here that explains the use of the XH code. There's only a real general statement about it at line 11 on page 51. But there's no explanation in this testimony how they researched what they're supposed to do other than their policies to follow the Credit Reporting Resource Guide.

In fact, this testimony was Ms. Rotkis saying, "Why don't you follow the XB requirement here in the Credit Reporting Resource Guide?"

So the fact, as Mr. Fratkin suggests in his sur-rebuttal, is that there was testimony from Ms. Lanham that they analyzed what the -- interpreted the Credit Reporting Resource Guide, and that now she would say that the 2017 document that the defendant proffers somehow confirms their research that she had performed, there's no evidence that that was done. It was just a very cursory discussion where she says we think we followed the law. We followed the guide.

I'd also suggest, Judge, we'd object because this document is unauthenticated and hearsay. So there's been no testimony or explanation as to how it

came about, how the document came into anyone's hands, where it came from. There's no testimony that it was even in the Credit Reporting Resource Guide.

THE COURT: So, Mr. Fratkin, I have to say you're going to have to show me where what Mr. Bennett says here is incorrect about how general and non-specific Ms. Lanham's testimony is in this deposition.

MR. FRATKIN: Your Honor, I think she answered the questions that she was asked. They didn't probe any further, but there's not a lot to explain. There's a resource guide that tells you how to report an account that is in dispute, and our client's disposition is that if it is an account that is a pending dispute, they report the XB code. That's what the guide says. That's what our client testified to. That's in the deposition in the pages that Mr. Bennett was citing. I can point the page to you if you'd like. Page 50, line 14.

So for compliance condition code XB, "Under what circumstances would Credit One Bank use the compliance condition code XB?"

"So we use the compliance condition code of XB when an account is in dispute and the investigation is continuing. So before the investigation has been

completed."

There's no further -- there are not any serious further questions there. Then there's the discussion about the compliance condition code XC. Credit One doesn't use that compliance condition code, it says, and the guidelines in Credit One's view say not to as well.

And then there is a lengthier discussion on page 51, beginning at line 11, about using the XH code. And I don't know what more Ms. Lanham could have said based on the questions, but the XH code, as Ms. Lanham testified, is that we use that code to show that we've completed the investigation and that we, Credit One, are the ones who are providing that information.

That's the -- I mean, I don't think there's a lot more specific that can be said, but there's certainly not many more questions about that either.

There is the Credit Resource Reporting Guide. The 2011 one has a few pages dedicated to it. Ms. Rotkis, and I'm not criticizing her, but she didn't go through it line-by-line with Ms. Lanham. That's mostly the testimony that was elicited on those codes.

MR. BENNETT: Just for the record, Ms. Rotkis

is not here. The 30(b)(6) designee on the questions that would deal with willfulness, how is it that you came to adopt these procedures, was not Ms. Lanham. And the testimony, the answers that you see, she was simply explaining what they did. This is what our procedure was.

What Mr. Fratkin is suggesting is that --

THE COURT: Who is the 30(b)(6) --

MR. BENNETT: Mr. Shutt, who is a former attorney.

THE COURT: Right.

MR. BENNETT: And what Mr. Fratkin is suggesting is that, and you recall his original argument that gets us here, was that they need this new document to show that that is the thinking that the company had when it was trying to figure out what the law required and what the CDIA required. And there's no testimony about that thought process. There is testimony about we pressed this lever and we pressed this lever, figuratively speaking, but there's no testimony suggested here by Ms. Lanham that explains -- where she would explain that this is how Credit One came to decide to press this lever in this way.

It's also, the Court already is aware based

on this Court's ruling on summary judgment, the Credit Reporting Resource Guide that Ms. Rotkis was examining the witness about was the opposite procedure of what the company was doing during this time period.

So that the point, all of this discussion about the Credit Reporting Resource Guide and the reason there wouldn't be more delving into it is because the gotcha was done. It was you're aware of the Credit Reporting Resource Guide. It tells you to use the XB code when a consumer disputes an account. And you don't do that. Right? Right. Mic drop.

There was no further explanation about, well, what if at some point in time the procedure changed. There was no reason for anyone to ask those questions. This was effective. This deposition testimony was confirmed that the defendant was not following the guidance that the Credit Reporting Resource Guide had to the extent that's relevant.

MR. FRATKIN: Your Honor, one more point if I may. I think that shows why we want this in because -- and I understand that's what the Court has essentially held, too, on whether Credit One conducted a reasonable investigation, but that's not Credit One's position in this case, and it's the evidence that we interpreted it differently, even if

erroneously, but we interpreted it differently than what Mr. Bennett is saying and what Your Honor is saying, and that is why we think it's not a willful violation, and that is what the jury --

THE COURT: So what do you mean? What evidence did you interpret differently? Where is that evidence?

MR. FRATKIN: That we --

THE COURT: How did you present it to me?

MR. FRATKIN: Pardon me?

THE COURT: Take the CDIA bolstering argument aside. How did you present it, previous counsel, present it to me that you interpreted the statute differently?

MR. FRATKIN: Your Honor, this gets into our motion on willfulness, the motion in limine. It wasn't presented to Your Honor.

THE COURT: It wasn't raised.

MR. FRATKIN: It wasn't raised; it wasn't presented. The threshold issue that we've raised in that what we've been calling our *Safeco* motion, but the motion in limine for the Court to rule that it wasn't willful as a matter of law, it was not raised with Your Honor. It's a -- I don't want to go too far into that, but it's a topic that courts rule on

frequently on the pleadings. And Judge Payne --

THE COURT: It wasn't pled. You cited *Safeco*. Your previous counsel cited *Safeco* in reply to a brief that the plaintiffs filed in opposition citing *Safeco*. You never cited *Safeco*.

MR. FRATKIN: Understood. There are two *Safeco* issues, though, in the case. One is the issue that I think our previous counsel cited in the reply which is just the standard as to whether the conduct was sufficient evidence-wise to establish willfulness, whether it was, you know, the language is a risk of violating the law substantially greater than a risk associated with a reading that was merely careless. That's the evidentiary issue, and that's in our jury instructions that if willfulness goes to the jury, that's the teaching from *Safeco* as a jury issue.

There's a separate preliminary issue that was not raised that the Court, we think, should decide, which is whether *Safeco* had -- I'm sorry -- whether Credit One had a reading of the statute that was not objectively unreasonable. And that is a, I think everyone would agree, a question for the Court to decide. It wasn't raised on summary judgment before.

THE COURT: So why isn't this an improper second motion for summary judgment?

MR. FRATKIN: Well --

THE COURT: Let me tell you this, Mr. Fratkin. I'm aware that you did not file that first motion.

MR. FRATKIN: Understood.

THE COURT: And so another lawyer filed that motion. But it is both -- that motion is filed on behalf of that same client. That you have a new -- you've mentioned a couple of times it took us awhile to get our arms around this, our hands around this, after you got my decision, but your client was the defendant in this case the whole time.

So either you realize that previous counsel missed a significant issue of law, raising it before me in summary judgment, and you move to reopen the case and do something about it or you own what the previous lawyer did. Tell me why that's not true.

MR. FRATKIN: So we obviously had a decision to make, and we thought this was a significant issue. And one was reopen the case; one was move to reconsider summary judgment or some combination; one was motion in limine, which was the path we chose; and I think one is after all the evidence comes in, raise it as a motion for judgment as a matter of law.

And I think in thinking the best way to get

this before the Court where we looked at all the cases or a substantial number of cases on this issue where they've been raised on motions to dismiss, they've been raised on summary judgment, which I think is the most appropriate place, and then Judge Payne had in the *Milbourne* case, which we point out in our reply brief, Judge Payne had it raised at the final pretrial conference and asked the parties to brief it.

And knowing all of that, and while it's, I'll say, unconventional to do as a motion in limine, we thought that if you're talking about a motion, the purpose of a motion in limine is to streamline the issues for trial and, you know, make the process more efficient, if this were successful, then what would be left for trial would be the issue of damages as a result of a negligent violation.

THE COURT: That also is pretty conveniently most advantageous to your client after discovery has closed. So you can't control whether or not when you took over the case discovery is closed. But when Judge Payne was deciding *Milbourne*, I would say the case was at a different procedural posture, and the issues that were before the Judge were different in many respects. So we're at the same place. We're at the final pretrial conference, but this is not

Milbourne.

I, in my first opinion, in the opinion that I wrote, told you and your client I could have struck everything. So rather than striking everything because of the immensely violative motion that your client, you put in front of this court, so that this court had to, in an effort to give the parties something to work with, cull through documents which this Court thought it was doing in the interest of justice so the parties could have a sense of what the core of the case should be, and I issued an opinion saying I could have struck everything. You have so violated the rules, I could have struck everything.

And so I can tell you I don't think that deciding to do it in a motion in limine in a final pretrial conference three weeks before the trial is responsive to the concerns that this Court expressed about how your client previously had handled the case unless it is the case that you want to take advantage of the timing with respect to when this Court would have to handle it and when defense counsel would have to respond to it relative to an impending trial date.

MR. FRATKIN: Your Honor, if we had decided to seek to reopen the case, I think the timing, assuming the trial date were still there, reopen

discovery or move to reconsider summary judgment, I don't think would be any different place on the timing. We certainly did not, and we still do not have -- there was no thought of taking advantage of any timing. That did not come into play at all in any of our discussions. And if there's an appearance that that was the case, then it certainly is not something that we thought of in our strategic discussions.

Honestly, Judge, I think the view was we have an important legal issue, and discovery didn't come into play either because, I think, because what I said earlier, these motions can be decided on the pleadings oftentimes. And we cited a case where it was in the Northern District of Georgia. It was a default judgment setting but it was essentially everything was done on the pleadings. The Court held unreasonable as a matter of law for the s2b violation for the investigation but then said, based on the pleadings, there wasn't enough to give rise to willfulnesswillfulness based on the *Safeco* analysis.

So our thinking was let's get this issue that we think is a very important issue before the Court to get decided. And it is a question of law. Like I said earlier, I don't think there's any question that this is something the Court needs to decide, and it

doesn't go to the jury, and we thought by getting it before the Court this way, this was the right way to do it.

THE COURT: Why isn't it -- because it's been done before doesn't answer why when we had willfulness in front of us on summary judgment you aren't obligated to raise it then. So I decided willfulness.

MR. FRATKIN: Your Honor, I don't believe you decided this --

THE COURT: No, no, no, no. So get to the core of what I'm asking. Okay. You just started to advocate. I know what your position is.

I had a motion that addressed willfulness that your client was fully represented as to all the positions it should have or would have wanted to take with respect to willfulness. It was briefed and argued.

Why, as part of that process, is it appropriate in any world for you not to address the issue you now seek to have me address? You say it's a matter of law.

MR. FRATKIN: The question is why isn't it appropriate to have raised it earlier?

THE COURT: Yes.

MR. FRATKIN: They should have raised it

earlier, I think, but I don't think that takes away that it can be decided at any time. There is a -- I'll make an aside. There's a difference of opinion among the courts in this district about whether some facts need to be established. Our view, and we put this in our motion, is that it's appropriate to decide as a matter of law. But I don't have a defense for why it wasn't raised originally at summary judgment. It wasn't.

Mr. Bennett said it was an issue that the Court already decided. The Court did decide an issue of willfulness.

THE COURT: So take into account, ignore what Mr. Bennett said for a little bit, stay on the issue I'm asking you about.

MR. FRATKIN: It should have been -- the best time to have raised it would have been --

THE COURT: But why doesn't it constitute, once summary judgment is entered on the issue to which it pertains, I know you're saying there are separate sub factors, but why isn't that the procedural moment that you are obligated to raise it?

MR. FRATKIN: The summary judgment was denied against the bank in this case, and so --

THE COURT: But it wasn't raised. So for you

to say I didn't decide this particular issue in summary judgment, it's because you didn't tee it up, even though I had willfulness in front of me. And you can't claim that what happened here is that it was a conscious decision not to raise it. You are trying to correct a previous lawyer's mistake.

MR. FRATKIN: Well, Your Honor, I understand what you're saying, but I don't think deciding whether it was conscious or not, and I would agree. I don't think that they thought that this issue was there and raised it. I don't know. But I'm guessing they missed it. But just because you don't raise an issue on summary judgment doesn't forever preclude you from raising that issue again.

THE COURT: But if the issue is before the Court, there is prejudice to the other side if you fail to raise it.

MR. FRATKIN: The issue of willfulness generally was before the Court but not this particular issue.

THE COURT: But you're saying I have to find it. So how can willfulness not include that that issue would have been part of it, Mr. Fratkin? I understand that you are trying to create essentially a different record than your previous counsel did, but

you are dancing on the head of a pin here.

MR. FRATKIN: Judge, I mean, again, our view is that if it's not decided right now, we will raise it, I don't think we've waived it, at the end of plaintiff's evidence to move for judgment as a matter of law. And we are trying to get it before the Court so we don't go through that process.

I don't think -- and the plaintiff, I don't think -- I know I'm not supposed to focus on what he says, but I don't think there's been a contention that we've waived an issue. I don't think we have because we didn't raise it.

And so our point simply is we'd like to get this issue decided. It's either now or it's after the plaintiff's presentation of the evidence or maybe after the close of the evidence if the jury comes back for a motion to set aside the verdict. But at some point in time I think the Court needs to address this, and this was our first opportunity -- let me take that back because it could have been before. I apologize. We think it should be decided by the Court. And so that's why we put it before it.

THE COURT: All right. So, Mr. Bennett, I'll let you -- we switched into willfulness a bit.

MR. BENNETT: Yes, Judge.

So the issue was fully briefed and on *Safeco* by the plaintiff, and the defendant's argument is not -- I mean, is now that the Court should do exactly what you're suggesting, which is that the defendant is arguing, which is to have a second summary judgment argument.

For all the reasons that we made in our papers and the Court already knows, we disagree with that. The local rule doesn't permit it. The plaintiff would be prejudiced. But also we shouldn't let the Court believe that there are any new facts. It isn't as if we -- that willfulness should be denied or should have been denied on summary judgment because former counsel did a poor job of briefing. That may be true, but substantively, factually, there is no evidence that there was a reading made. That is, we took Mr. Shutt's deposition, and we asked in written interrogatories. There's plenty of opportunities for the defendant to assert that it had a reading of the statute.

A year or so ago our argument was *Milbourne*. It was that in *Milbourne*, Judge Payne correctly held that you don't look at *Safeco* unless there's proof that there was actually reading. We don't need to do that anymore. *Milbourne* is still great. It's been

cited in Oklahoma. It's been cited in Florida. But I can now cite authority which is the Fourth Circuit decision, and that, pardon my scrawl, *Daugherty*, in considering another furnisher case on summary judgment, and this is on page eight of the opinion, of the Westlaw version of it, but it's at page 257. It rejected the argument that was made that precedes the highlights by the defendant on appeal as to defend its position, its legal position under *Safeco*. And the Fourth Circuit importantly held that nothing in the record suggests that *Ocwen* acted in reliance on any other interpretation of the statute. And that thus the jury could so conclude.

I don't have it on here, but you now have Justice Pryor in a 2017 case in the Eleventh Circuit that is styled *Pedro v. Equifax*, but it was actually a TransUnion decision, granted summary judgment to the -- or affirmed, rather, summary judgment to the credit reporting agency on the question of accuracy in that case, a different fact pattern. And the plaintiff in that case was trying to argue that an earlier Eleventh Circuit case, *Hinkle*, H-I-N-K-L-E, *versus Midland*, the Eleventh Circuit had ruled differently as to willfulness.

And the majority opinion in *Pedro* said yes,

but in *Hinkle* the defendant didn't put up any evidence to prove that it actually had a reading of the statute. And so it's different here.

And on wilfulness, the plaintiff in *Pedro* lost because in that case, the Eleventh Circuit held that there was proof that TransUnion had actually adopted a reading, analyzed it, and determined it.

So the decision in *Milbourne* is important because it's in this courthouse. The Fourth Circuit has similarly analyzed the statute. The Eleventh Circuit, in *Pedro*, has similarly analyzed the statute. And there is no evidence substantively that even if Mr. Fratkin had tried to save this defendant on summary judgment, maybe the case would have settled then, but it certainly wouldn't have had a different outcome.

There is no evidence that this defendant made an effort to interpret the statute such to qualify for even coming before your court on summary judgment, let alone at this stage, and arguing objectively reasonable interpretations like a qualified immunity defense.

THE COURT: So, Mr. Fratkin, I do want to hear where you think, in the evidence that exists, that you put forth evidence that there was a

reasonable reading of the statute.

MR. FRATKIN: Thank you.

So there's two issues in the *Safeco* motion. One is the Court's decision that we failed to conduct a reasonable investigation for not reporting the account as in dispute. And that's this whole discussion we've had about the XP versus XH code.

So what Mr. Bennett said was the *Daugherty* opinion said --

THE COURT: No. I'm asking you about facts. So you've got to get to facts a little faster than you are right now.

MR. FRATKIN: All right. Warming up to it, Your Honor, but I apologize.

So the facts are everything we've been talking about on the compliance condition codes. Our facts are that we interpreted the provision to require an XH code, or we thought it was okay to put down an XH code when the account was in dispute. And that's what I read earlier that Ms. Lanham's testimony was.

That's an erroneous interpretation of the statute under the Court's ruling, but that's okay under the *Safeco* analysis.

The Court's view --

THE COURT: What part of that testimony you

pointed to me suggests remotely that it's reasonable or even not unreasonable? She gave no detail. So if you say you have facts that put that at issue, it's not -- if you want this in front of a jury in some form or another, you can't rely on that.

MR. FRATKIN: Well, this part we don't want in front of the jury.

THE COURT: Yeah, I know. You want it in front of me. I know you're saying this is something that I need to decide as a matter of law. And Mr. Bennett says there isn't any evidence in the record that you made either a reasonable or a not unreasonable interpretation. So you can't just say, This is what we did.

MR. FRATKIN: Right. The interpretation is laid out in all of our policies and procedures.

THE COURT: Which was never in front of me on summary judgment. You didn't append it. In summary judgment, you didn't append Mr. -- I would say Shutt, but Mr. Shutt's (pronounced Shoot's) deposition at all.

MR. FRATKIN: We didn't raise this on summary judgment, Your Honor. I get that. The *Safeco* issue -- that's why it wasn't before, Your Honor, because it wasn't raised. But if the Court is asking

me what evidence there is now, if the Court wants to know evidence of an interpretation --

THE COURT: Yeah, I want to know. Give me a sense that if you want me to decide this on some kind of motion in limine after discovery has closed, after you haven't identified it at all, after your first counsel totally missed it, you're going to have to give me a reason that it's not going to be an entire secondary waste of this Court's time.

MR. FRATKIN: So we begin with Mr. Shutt's testimony where he testified that he read the statute. He read *Johnson v. MBNA*. He read *Saunders*. Ms. Lanham testified that she read *Saunders* and interpreted it to mean that the company has to report a debt that's in dispute as disputed.

Mr. Shutt's testimony was that he created a policy that then was disseminated to the different departments at the bank to create procedures. We have the procedures that are before the Court now on exhibits, but the procedures with respect to the dispute codes say to report XH once the creditor finishes its investigation.

Ms. Chu and Ms. Schmitt testified that they -- or I know Ms. Chu testified about why she reported the code as XH. That was what their policies

instructed them to do. And --

THE COURT: Ms. Chu said she hadn't been trained on FCRA at all.

MR. FRATKIN: She did side-by-side training on how to respond -- I don't think the *Safeco* analysis requires --

THE COURT: Right. I'm just making clear that if you're saying that this is reasonable, what Ms. Chu says is nothing that's reasoned; right?

MR. FRATKIN: Well, she did what the -- I was using that to show that the policies were in place, and the policies reflect the company's interpretation of the statute which were created by the departments that had been given guidance by --

THE COURT: So where is Mr. Shutt's testimony about why he concluded XH was appropriate?

MR. FRATKIN: I'm not sure Mr. Shutt said that. Ms. Lanham said that they followed the Credit Reporting Resource Guide, and that her interpretation of that was that XH is supposed to be the way in which to report a dispute as disputed.

We're coming at this from the premise that the bank was wrong. The Court has ruled that. The *Safeco* analysis assumes that the bank was wrong. And so the questions the Court is asking are such that --

THE COURT: Yeah, but what you're trying to say is that you're wrong but that you're reasonable. And so I'm trying to get at that it's not unreasonable, at least. That's the *Safeco* standard. Right? That's what you're trying to get me to find.

MR. FRATKIN: Right.

THE COURT: So why is it not unreasonable that you got it wrong?

MR. FRATKIN: So the statute says -- so the *Safeco* analysis to determine whether the reading is reasonable or not is: Is the statute less than pellucid? And our view is yes, it's not clear. And that's based on the statute saying you have to conduct a reasonable investigation, and if you find it inaccurate, you have to report those results -- incomplete or inaccurate, you have to report those results back. That's all the statute says.

It took *Johnson v. MBNA* and *Saunders* to flush out that investigation means --

THE COURT: Yeah, but they're done. They're done.

MR. FRATKIN: But you start with whether the statute is less than pellucid. And my point on step one is that the statute is less than pellucid. So that satisfies *Safeco* test No. 1. Then you look at

what the courts have said, *Saunders* and *BB&T*, because that gives guidance. And *Saunders* and *BB&T* don't specifically say -- *Saunders*, *BB&T* and *Johnson* don't specifically say how do you actually code an account as in dispute. They just say you have to mark an account as disputed. That's all *Saunders* says. So you're left with that as your guidance. Mark the account as disputed.

The Court has said, You have to do XC. We say, We thought XH was the right way to do it.

THE COURT: XH being?

MR. FRATKIN: XH being --

THE COURT: -- being the account was in dispute, now resolved.

MR. FRATKIN: Correct, right.

THE COURT: You're saying that is reasonable?

MR. FRATKIN: Your Honor, that's what we're saying, and that's why the CDIA guidance from 2017 is important because it says don't even report any of the codes. Use those in direct disputes.

The testimony from Ms. Lanham was that XH, to her, indicated that the account was in dispute. Everything that comes to a furnisher from the consumer reporting agency is in dispute. And so their position is that that's how you respond to an ACDV where --

THE COURT: Where did she testify to that, that level of detail, or are you adding it?

MR. FRATKIN: I can find where I'm getting that from. So we used the -- this is on page 51. So we used the -- I'm skipping the extra words, but we used the code XH after an ACDV is completed to make sure that when the consumer sees their credit report, they know that we have, you know, completed the investigation and that we are the one who are providing that information because it says account previously in dispute now resolved, reported by the data furnisher, so that the consumer knows that the bank is the one updating the credit report, not the CRA.

And then what does "now resolved" mean? It means that we've completed our investigation of the dispute in compliance with FCRA. It's telling the consumer that the account was disputed and that the furnisher has reviewed the dispute.

And I get the Court says that that's wrong, but that's the investigation that we think shows that -- I mean, that's the testimony that we think shows that the furnisher acted reasonably.

I'll add that the guidelines that we relied on, the 2011 Credit Reporting Resource Guide, don't

give -- I mean, those tell, in our view, tell us to report that way as well. And then, you know, again, not to rehash the old argument, but the 2017 document certainly says that the way in which the bank has interpreted it is not unreasonable.

That's only on this compliance condition code piece. There's the whole separate issue with the identity theft report, which we haven't touched on.

THE COURT: No, we're staying on this one.

MR. FRATKIN: Okay.

THE COURT: So, Mr. Bennett, did you want to respond?

MR. BENNETT: The only thing I'd note is that while we get in the weeds about the 2017 versus the then present CDIA code, the law was *Saunders* and *Siemens*, the Third Circuit decision, and those cases said you had to tell the credit reporting agencies the consumer disputed the debt. So whatever code is used or not used.

And our position, I think we've already made it with respect to these other arguments here, but the case law was crystal clear. You have Third and Fourth Circuit decisions, long held, that if the furnisher knows the account is disputed, they need to tell the CRAs that.

In *Saunders* and *Siemens* -- in *Saunders*, rather, the argument is that no code was used. That was a fact. I tried the case in front of Judge Dohnal, and I did the appeal. The facts were no code was used and they should have used a code.

And so to the extent that the confusion the defendant suggests exists in the statute as to whether it had to report -- as to whether its procedures were correct, the question of confusion of what's pellucid is not what the CDIA manual reads. I don't think that's pellucid, but that's not the legal question. The question is: Was the statute clear? And to the extent the defendant would argue it wasn't, it was in 2007 when *Saunders* came down, and it was when the Third Circuit decision in *Temple University* came down.

This is black letter law now that if a consumer disputes an account and that account remains disputed, the defendant needs to report that, and it didn't, whatever code is at issue. And certainly the XB code during the reporting period was itself clear. It is what you use when there's a dispute made under the FCRA.

And it's clear enough that the 2017 document that brought us to this conversation expressly says "No longer do it that way."

MR. FRATKIN: Your Honor, an additional point, based on what Mr. Bennett said. So *Saunders*, we agree, states that you have to report the account as disputed. And what he just said was no code was used in *Saunders*. That was the problem.

When you're a consumer and you get your consumer report or presumably when you're a lender and you get a consumer report, there is nothing that shows that the account was ever reviewed because they reported it back with no code.

Here XH was used, and our witness said that that indicated that we had looked at the dispute, that the account was in dispute. So that makes our point. That's why the use of the XH code is important here.

THE COURT: So why -- tell me this. I know you keep saying, Well, you say we got it wrong. Why is that a reasonable interpretation if you have an XC code?

MR. FRATKIN: I'm sorry, Your Honor. Why is it a reasonable interpretation?

THE COURT: Or not unreasonable.

MR. FRATKIN: I'm not saying that -- well, so we disagree with the Court's opinion that we failed to conduct a reasonable investigation as a matter of law and didn't mark the account in dispute. The Court's

opinion was that you have to use an XC code.

I'm not here to say whether that's an unreasonable position. It's not that you can't use XC.

THE COURT: Well, what does XC say?

MR. FRATKIN: XC says, Account -- I can pull it up quickly. I think it's reported the consumer disagrees is the key language.

I mean, there's more to this. The bank's position on that is when you're doing a direct dispute, meaning you're not going through the CRAs, the consumer reporting agencies, so the consumer calls up himself and says, "I dispute this on my credit report," the only way for the consumer to know or the CRA to know is if you do an investigation, and if you know that the consumer continues to disagree in a direct dispute to market as XC. But we're not talking about a direct dispute here. So that's why the bank didn't use the XC code.

There's a frequently asked question --

THE COURT: I've read that.

MR. FRATKIN: Pardon me?

THE COURT: I've read that.

MR. FRATKIN: Okay. Well, I don't think the Court wants me to go through it then.

I don't think -- I mean, the bank's interpretation of the XC code and other companies would be that's used when there's a direct dispute. Again, that's what the 2017 document says as well. But we're not talking about a direct dispute here for purposes of this case. We're talking about a dispute that came through the consumer reporting agencies.

THE COURT: All right. So I'm going to take a recess. We've been on the record for a bit. I'm going to review my thoughts on this, and then I'll take the bench again in 10 or 15 minutes. All right. We'll take a recess.

(Recess taken from 2:30 p.m. to 2:55 p.m.)

THE COURT: All right. So we've addressed two issues today, which one especially is substantive, which is why I began with them, and it's fed in some part by the desired use by Credit One of these CDIA documents that were disclosed on November 21.

Essentially, with respect to what is Wood's omnibus Subsection 6C seeking to exclude the CDIA documents as untimely and prejudicial, what Credit One suggests here is that under Rule 26(e) that it requires -- 26(e) requires supplementation in a timely manner if the party learns that in some material respect the disclosure or response is incomplete.

They say that this particular document was not available until March of 2017, and in their briefing they suggest that they weren't aware of its importance until the Court made its decision September of 2017, and then new counsel spent time trying to assess the case when previous counsel no longer was handling it.

They suggest that to the extent there is any violation, it was substantially justified and harmless. They've argued that there's really no surprise because it's been at issue all along, and then at some point suggested it was publicly available both in their briefing and that it was available on Google, and that Mr. Wood has had the opportunity to cure offering today to allow testimony from Ms. Lanham about the information in the document. And they say it's important to his claim and their defense with respect to willfulness.

So, obviously, in order to determine whether or not the sanction of exclusion would be justified, the Court has to determine whether a violation of the discovery order or one of the Federal Rules of Civil Procedure occurred and determine whether or not that violation was harmless or substantially justified applying the *Southern States Sherwin Williams* factors as articulated by the Fourth Circuit, and then fit the

sanction to the violation, if one is found.

Here the Court has to find that this was not turned over in compliance with Federal Rule of Civil Procedure 26(e). 26(e) requires a party to supplement its disclosures in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect. It argues it was timely here based on when it learned of the document, but it is the case here that we had discovery close on July 26 of 2016. This document was created in March of 2017, and there's no attempt to suggest why they wouldn't have presented the document in March of 2017, which would have been beyond the close of discovery in any event.

This Court issued its opinion in September, and Credit One didn't issue or supplement even then to the extent there's some suggestion that Credit One was not anticipating what the Court would address in its summary judgment motion or that it was an issue in the case.

They then supplemented essentially the week of Thanksgiving, November 21st of 2017. The Court, first of all, even presuming that some kind of supplementation is appropriate after the close of discovery without trying to somehow invoke my case

management order or involve the Court in the process as to what might be going on. Credit One I can't find made the supplementation in a manner that was substantially justified or harmless.

So looking at *Southern States*, the Court has to address the surprise to the party against whom the evidence would be offered, the ability of the party to cure the surprise, the extent to which allowing the evidence would disrupt the trial, the importance of the evidence, and the nondisclosing party's explanation for its failure to disclose the evidence.

So the explanation with respect to the failure to disclose is not entirely persuasive, and certainly the fact that even when it was discovered I can't find the delay or the supplementation or the attempted supplementation could be substantially justified.

It is the case that, sort of on the other hand, Credit One is sitting and standing before this Court arguing that these codes were important all along, and that it had a reasonable interpretation of the codes, and that because of that willfulness is a nonissue in front of this Court. And so to the extent it wants to supplement its position as to how these codes should or should not be read, and that it is now

belatedly raising directly the issue of whether or not it had a not unreasonable interpretation of the statute, it certainly can't claim surprise about this particular issue.

So to the extent it's trying to lay the issue of whether or not it should have known to address this at the hands or the feet of this Court's decision, Credit One cannot take the inconsistent position that of course this Court had this matter of law in front of it the whole time and should have ruled on it and now should rule on it in a motion in limine because it's so obviously something that this Court should rule on. So it does not meet the first factor.

The document itself clearly has issues about relevance because it's after-acquired evidence. It's evidence that certainly Credit One does not claim nor could it that it relied upon when making any kind of decision with respect to its reasonable or not unreasonable interpretation of the statute. And so any attempt to bring it in now certainly isn't relevant to the decision it was making at the time of this particular case, but it also leans toward bolstering its own interpretation through a third party in an inappropriate fashion. And so it's potentially deeply prejudicial for that reason.

Although Credit One stands here offering to allow additional discovery with respect to the nature of the document and how Credit One interpreted it, that's certainly, while they would offer to do that in the next three weeks, it disrupts the pretrial preparation process to offer that in any event, especially for a document that's now been extant nearly a year, whether or not Credit One knew about it. It's not the case that the emergency of when they figured it out should create undue prejudice to the other side or interfere with trial preparation.

So the Court has to find that it would disrupt the trial. Because the Court finds that it violates and does not meet several of the factors in *Southern States*, and the Court does not have to consider all of the factors, Mr. Wood's motion 6C to exclude evidence as to this document is granted.

Now, I'm going to talk about willfulness a little bit, and I'm going to be sure that I get back. This is an important issue. And so I'm going to tell you where I'm leaning on the willfulness issue, and I'm going to issue an opinion so you guys can have the opportunity to address it on appeal.

So both Credit One and Mr. Wood recognize that there is no specific rule with respect for

motions in limine, but certainly courts have used them in an evolutionary process for an inherent authority to manage trials. And it is, generally, the purpose is to allow a Court to rule on evidentiary issues in order to avoid delay and ensure an evenhanded and expeditious trial and focus on the issues that the jury would consider. That's certainly Eastern District law and black letter law.

It is not generally to use for the purpose of granting judgment as a matter of law. And that's generally covered under rule 56(a). My initial pretrial order, as modified by amended scheduling order, set the deadline for dispositive motions, such as summary judgment, for August 31 of 2016. And this Court's local rules give each party one motion to file for summary judgment under Local Rule 56(e).

Credit One submitted a motion for summary judgment seeking summary judgment on all aspects of Mr. Wood's complaint, including his allegation that Credit One willfully failed to comply with the FCRA.

It then filed a memorandum of law that was nine pages long. Two paragraphs of the memorandum were devoted to its argument that Mr. Wood's willfulness claim failed. So at the opportunity of Rule 56 seeking -- Credit One seeking its motion as a

matter of law, it filed two paragraphs on willfulness. It didn't cite *Safeco*. It cited *Safeco* for the first time in its reply brief in response to the plaintiff having raised it. And it purportedly included a full two pages of argument and analysis related to *Safeco*, but I can't say that the two pages fully covered the issues, even the issues they say they were raising.

Credit One made no argument about objective reasonableness and certainly did not present the argument that counsel is now seeking to present in the court as a motion in limine. Specifically, Credit One argued at pages seven and eight that its "actions were not objectively unreasonable." It argued its actions were not objectively unreasonable. And in support of this statement, Credit One included the following sentence:

"The only evidence in the record is that Credit One had in place written procedures and policies governing its investigation of credit disputes. Personnel are trained on the handling of credit disputes. Mr. Wood cannot present any evidence to demonstrate that Credit One did not comply with these procedures in investigating its disputes."

So when Credit One made that assertion at page eight, it cited zero portions of the record. It

didn't make a single assertion on the record. It did attach to its motion for summary judgment elsewhere depositions of Mr. Wood and Ms. Chu and Ms. Schmitt. Obviously, Mr. Wood didn't have any testimony regarding Credit One's policies or interpretation of the FCRA. Ms. Chu was, as everyone here knows, the ACDV processor during the time period relevant in the case, and she testified regarding the training she received and the procedures she undertook when investigating an ACDV submitted by a CRA.

On page 51, Ms. Chu specifically said she was never trained in Credit One's FCRA policies. She didn't know what the Fair Credit Reporting Act was, and she said she didn't know what ACDV stood for.

Ms. Schmitt was also an ACDV processor at the relevant time. She testified regarding the training she received and the procedures she undertook. During the deposition, she was shown a training manual that appeared to discuss procedures in place while Ms. Schmitt worked at Credit One, and counsel questioned her about the manual.

Ms. Schmitt didn't, as far as this Court can assess, she testified that she really didn't know specific personal knowledge of the training manual nor did she testify as to how the manual was created.

In its motion for summary judgment on willfulness, Credit One did not submit the depositions of Allan Shutt, who was in-house counsel and chief compliance officer and who did testify somewhere regarding how Credit One developed its compliance policies and procedures.

It did not submit the deposition of Helen Lanham, Senior Vice President in Corporate Risk Management, who testified that Credit One had procedures based on the Credit Reporting Resource Guide, and although these depositions were before the Court, at least parts of both of them because Mr. Wood submitted them in support of his motion for partial summary judgment, Credit One is required to support its motion with, under Rule 56, "particular parts of the materials in the record that would be admissible in evidence."

The Court does not have any obligation to sort through the record and make a party's case for it, rather the Court need only cite the submitted materials or it only considered the cited materials.

On summary judgment, the party seeking summary judgment bears a burden of showing that there's no genuine dispute as to any material fact and that the movant is entitled to a matter of law.

So on summary judgment, Credit One chose not to make any argument as to whether or not it had relied on an objectively reasonable or not unreasonable objectively interpretation of the FCRA. And it now contends that the Court should consider that as a motion in limine.

So certainly the Court has grave concern as to whether or not this motion is an attempt to circumvent what Credit One should have done under the Court's pretrial order and under Rule 56.

If this is an issue that has been addressed as a matter of law, and the rules require that dispositive motions address such issues, and certainly it is clear that Credit One is arguing now that this would be dispositive of this aspect of the willfulness issue and so the Court has to do it before trial, the Court finds that plaintiff's argument, that this is essentially an end run by new counsel to address issues that former counsel essentially missed and is, in essence, a secondary Rule 56 motion in violation of that rule and the local rules prohibiting that.

Now, as the Court has already mentioned to counsel here, it took into account previous counsel's motion despite a series of failures as to how it was briefed and what it briefed, and then addressed issues

in an attempt to, in the interest of justice, move the case along in an appropriate fashion.

It did that, however, not seeking out arguments that a party chose not to raise for whatever reason or just failed to raise by inadvertence or negligence, and it is the case that Credit One is correct. I am required to make a finding as a matter of law whether or not they were engaged in an objectively reasonable interpretation or at least a not unreasonable interpretation of the law as defined in the *Safeco* case.

So Mr. Wood here is crying foul saying that Credit One is seeking a second stab at summary judgment and is inappropriately attempting to use a vehicle of a motion in limine to do what it should have done initially under both the Court Order and Rule 56.

So I am telling Credit One that I'm going to issue an opinion on this, that I will consider the arguments that they have raised today, but I am strongly inclined to make a finding that this does violate the Court's rules and Rule 56, and that it does so in a fashion that would subject Credit One to an appropriate set of sanctions, which can include all sorts of things, certainly monetary sanctions. It can

also include certain findings with respect or corrective instructions or findings that I instruct to the jury.

As I do that, though, I want to be sure that I've taken into good account all that the parties have put in front of me. Specifically, I want to be sure, because there has been a tendency to underrepresent the facts of what each side is relying upon as they make their arguments, I want to review what I did have in front of me and make sure that I'm giving credit to what Credit One says was there. Whether or not that can get over the procedural mistakes will be a secondary matter.

So I'm not going to make a final determination on willfulness, but I'm having trouble seeing how we determine that at this late stage after discovery is closed when you had an opportunity to move, and you didn't, how that is not a violation of the Court's orders as they stood.

So I will issue an opinion. And it is the case also if I decide I need briefing, I'll ask you all for it, but I want Credit One to know that all of that is going to come at the risk of sanctions. Sanctions being, of course, not just your own fees, but, of course, the fees of the other party.

MR. FRATKIN: May I ask a clarifying question, Your Honor?

THE COURT: Yes.

MR. FRATKIN: If I understood the Court correctly, is the Court still inclined to issue a ruling on the substantive issue of whether there was -- whether there was an objectively reasonable interpretation as a matter of law? Put aside the procedural sanctions issue, if the Court finds that the procedural way in which we brought this was improper, does that mean that the Court is not going to issue a substantive ruling on the willfulness issue? Maybe I misunderstood the way in which the Court was saying what it would do, and I apologize.

THE COURT: The issue would be whether there's any evidence that I can consider that you had a reading of the statute at all since you failed to address the issue.

MR. FRATKIN: Failed to address the issue on summary judgment?

THE COURT: Failed to address the issue. You didn't address it. A dispositive issue at a time when you were addressing the other part of the dispositive issue. And so the question is whether you should be allowed to do that at this late date with evidence

that was on the record the whole time. And I'm excluding the CDIA.

MR. FRATKIN: I understood that. We have not -- we have not addressed the arguments at all on the identity theft report, and, again, I think if the Court's consideration is that that evidence was there all along, too, then I assume that there's no need to separately ask a question about that. But we didn't argue that today.

Sorry. I'm thinking out loud for a second. If I may ask the Court if the motion in limine is withdrawn, will the Court not issue an opinion on the sanctions issue, because in our view this is something that while it wasn't raised on summary judgment, if we get to trial --

THE COURT: Don't you have to ask to withdraw it?

MR. FRATKIN: Well, the Court is inclined to issue a sanctions ruling, and I don't want to withdraw a motion and then still have the Court issue a sanction for the filing of this motion. And I would need to talk to my client, but -- I was inquiring whether a --

THE COURT: Are you saying that you want to avoid sanctions by filing it even later without having

a ruling on whether or not this is admissible?

MR. FRATKIN: I think the issue can be raised at any time. It can be raised at the pleadings. It can be raised on summary judgment. We thought motion in limine. I hear what the Court is saying, but certainly after all the evidence at trial comes in, we can raise the issue as a motion for judgment as a matter of law. And if the Court feels --

THE COURT: I said I haven't decided yet.

MR. FRATKIN: Well, I'm asking -- I understand that, Your Honor, and I'm trying to get an understanding of our possibilities here given that the Court -- I don't want to run the risk of the Court excluding evidence at trial as a sanction, which --

THE COURT: So you take the opportunity to educate me about why you are so absolutely right about why it can be raised at any time and I shouldn't issue sanctions before I issue the order. You can file that whenever you want to. When do you want to file it?

MR. FRATKIN: Right. Thank you.

THE COURT: All right. We're going to turn to some of Mr. Wood's motions with respect to exclusion. So I want to address first Mr. Wood's motions with respect to one, two, three, and four. And so I'll hear your argument, Mr. Bennett, as to the

motion where you say you want to exclude evidence with respect to Credit One's reporting to the CRAs regarding an account whether it was accurate.

MR. BENNETT: Yes, Your Honor. We sought summary judgment on this very issue to avoid a body of evidence that we believed would be unfairly prejudicial and confusing. I don't want to go to trial when the identity thief or the fraudster is related to the victim. There's no legal distinction there. A victim is a victim.

I've lost a trial where a son stole the identity of a father and spent a week in Detroit on this issue. And so in circumstances like this, to avoid attempts to essentially get the jury to nullify the evidence, to find that notwithstanding that as a matter of law Mr. Wood never opened the account, used the account, knew of it while it was happening, that because relatives are responsible for the sins of the other relatives, he should be responsible for that. So the very basis for us going to substantial links to prove pretrial, pre-motions practice, and then to litigate on summary judgment the question of whether or not the reporting was accurate was to avoid this very issue at trial. We thought it was done and over, and now we have a new defense team, a good defense

team, but a defense team that, again, wants a do-over on this subject.

I've had discussions, substantive discussions, of us attempting to convince defense counsel that it should not make these arguments.

THE COURT: So tell me specifically. You're saying the questions about whether or not -- that you're seeking to exclude evidence about whether or not the reporting was accurate. That's pretty broad. So, you know, you have to give me something to rule on.

MR. BENNETT: So, specifically, in terms of tangible, hard documents and witnesses, this is the motion that would describe our objections to the West Point police officer with the after-acquired evidence, and then the police incident report or the notes that the defendant produced.

It also, Judge, would seek, because a motion in limine can deal with evidence, but it would also prohibit the defendant from opening statement and closing argument suggesting and stating that our guy, Mr. Wood, was responsible for the account and that its reporting in any way would be accurate and could have been accurate.

We won that issue on summary judgment through

great effort, which it is correct that we won that issue on summary judgment. And I don't want to go to trial and have this trial about whether a jury should assign blame to Mr. Wood because of the actual identity theft with his mother. And everything in our pretrial discussions with counsel suggest that's a big part if not their primary defense is to continue the same type of argument that even though there is no contractual basis, no evidence that our guy used the card, knew of it, or otherwise, that there's this philosophic position that he should be responsible, and that's not the law generally in Virginia, and it's certainly not the law in this case based on the Court's ruling.

I think that if the Court rules that with respect to statements or claims that the reporting was accurate, that our client was responsible for the account, such as with respect to those witnesses and those documents, and then Mr. Fratkin makes the argument or makes the statement in opening contrary, I will object, and the Court's position will have already been stated. So I don't believe that the Court needs to have a long list of things that can be said or not be said.

So that's the generality of our motion that

explains that. But the tangible part of it would be attempting to argue through these two police employees, apparently police employees, a belief that my client was making it up. That, in fact, he might have been the one that used this account. In fact, the legal question has already been determined.

THE COURT: All right.

MR. FRATKIN: Your Honor, it's not the position we're going to take. We're not going to take a position at trial that the reporting or that Mr. Wood opened the account. I thought this motion was trying to prevent us from taking the position at trial that we now believe that he did not open the account, which is a position I think we want to take, which is after thinking through this and learning some additional things, and the Court's opinion, we don't think Mr. Wood opened the account. That's the position we're planning on taking at trial, not that he continues to be responsible for the account. So I'm not sure where Mr. Bennett gets our position from.

On the police reports, we've said in our separate motion on that that we plan to use that, if necessary, for impeachment purposes. The Court ruled in a prior order that at least one of those witnesses would only be for impeachment purposes. The second

witness is also for impeachment purposes. I'm not planning on bringing that up in opening.

So our plan is, just to sum it up, we're not planning to reference or suggest that Mr. Wood is responsible for the account.

MR. BENNETT: Your Honor, may I ask counsel a question?

THE COURT: Why don't you express your concern to me.

MR. BENNETT: To the extent that this is a change in position from the opposition brief, that it would be resolved, but the opposition brief -- and I overhear that that's not so.

So the opposition brief suggests that the defendant still intends to use this evidence on willfulness to suggest that its belief that its reporting was accurate, was correct. And that's at page 2 of document 144.

Defendant writes, "Put more concretely, evidence that was relevant to the question of inaccuracy at the summary judgment stage will also be relevant to willfulness at trial. For example, when deciding whether Credit One's reporting to the CRAs was inaccurate, the Court considered Credit One's reporting procedures and the information it received

from Wood, the CRAs, and the Consumer Data Industry Association (CDIA), and regardless of the Court's ultimate conclusion on accuracy, these procedures and that information are still relevant to Credit One's intent with respect to the Wood's account."

So to the extent that the defendant's position is that it wants to re-litigate what was argued and proven on summary judgment, that is, the fact that this was not his account, the defendant wants to do this now at trial under the guise of saying, Yeah, we know today it's not his account, but all of the evidence that was presented to us, we thought it was his account, and here's all the evidence that would support a belief that it was accurate.

The Court has seen all that evidence and ruled that it could not have so found its investigation reasonable in the face of that evidence. So from both of those directions, it would not be relevant. But certainly any modest benefit the defendant would get would be overwhelmingly unfairly prejudicial to our client because of the risk of jury nullification or somehow re-litigating the accuracy and obligation evidence that's already been determined.

With respect to what Mr. Fratkin just said as to the police individuals' impeachment, I don't know how it would impeach unless the issue was accuracy, because the only evidence that they were offered for by the defendant was this belief by one person that she believed my client wasn't telling her the truth. He didn't say there was any evidence of that, and it turns out we know she was wrong. But they would use that evidence to impeach him only on the question of accuracy.

This is not somebody, if the Court recalls, this is not somebody that the defendant ever talked to itself, had any evidence from, had any documents from. This was all litigation after-acquired evidence.

THE COURT: So can you see of no way that Mr. Wood, through testimony, could open up the door where they could try to introduce those -- are you saying they're precluded as a matter of law from impeachment if he says something that opens the door?

MR. BENNETT: So he never had any communication with one of the individuals. The other individual, Sergeant - I believe - Woodson, I think that the Court would -- I don't think that on the question of impeachment, the Court could fairly exclude from the entire universe of possibilities that

witness. So I would agree with the premise of Your Honor's semi-rhetorical question there for impeachment. But I'm unaware of anything because there was not that much communication, and the only issue was -- the only issue was her suspicion that my client was gaming the system because he had gone to two different police departments to report the theft. And that's it.

So if the Court found that she's excluded except for impeachment, there's still, on the question of accuracy, the evidence wouldn't be properly admitted, and I don't think ultimately there's any possibility the witness comes in. So that at trial, if Mr. Fratkin proffered that witness to impeach, he would have to explain it. I can't conceive of what the basis would be.

THE COURT: So why don't you tell us.

MR. FRATKIN: Well, for one, it's for impeachment, but there's testimony and evidence that came out on summary judgment about whether Mr. Wood asked for an identity theft. I mean, asked to have his police report. He said he contacted the police department multiple times and never was able to get it.

The police officers, one of the police

officers' testimony, and I apologize, I don't remember which one it was, maybe both, said they don't recall any record of him ever requesting, and that had he requested one, they would have given it to him.

So for that reason I think that there's a potential it could be used for impeachment. I don't think the Court should be ruling now on the document that didn't need to be disclosed in the first place for impeachment purposes.

So separate reason not to address that issue right now. These are documents that don't need to be disclosed until at trial. And so I'd ask the Court not to rule on those documents or those witnesses now.

The separate issue on the accuracy, and maybe Mr. Bennett and I were talking past each other on the motion, there's what Credit One believed at the time versus what it believes today. At the time it certainly believed that Mr. Wood was responsible for the account. If they'd thought he was not responsible, then they would have deleted the account and we wouldn't be here today.

I don't want the jury to be left with an impression they thought that he was responsible for the account and part of their investigation looks into whether they believed that the consumer is responsible

for the account. And so certainly at the time they thought he was based on the information that they had, and we put this in our brief, but this is evidence appropriate to be considered for the dual purpose of willfulness.

So that's why for the belief at the time we think it's still appropriate for our witnesses to testify that based on the information they had, they thought that they were properly reporting the account based on their belief that Mr. Wood still was responsible for the account.

And, again, the Court already ruled that he's not. And the Court's ruled that the investigation was unreasonable, but there's still the question of willfulness left. And certainly what they did in the investigation is relevant which includes whether they thought he was responsible.

THE COURT: So tell me the basis of your new theory that he's not responsible for the account.

MR. FRATKIN: I talked to Mr. Wood's mother. She told me that she opened the account. She said Mr. Wood was in a coma when the account was opened, and I don't have any reason not to believe her.

There's other reasons, too, from the Court's opinion and our investigation.

THE COURT: You had a sworn affidavit.

MR. FRATKIN: It was not an affidavit, Your Honor. It was a document that says --

THE COURT: Okay. I wrote about that. I wrote about how that document was attested. And, unfortunately, your counsel, who broke every evidentiary rule filing his motion for summary judgment, decided to attack that statement because it wasn't properly attested to.

MR. FRATKIN: Your Honor, you asked me why we believed, and I said I talked to the mother. She told me --

THE COURT: No. I asked you after that. You had that document in advance, and you said it wasn't --

MR. FRATKIN: Well, I was going to say and the Court's opinion and other things. And, sure, that document factors into a whole bunch of things that the company's position now is going to be we don't believe he was responsible for the account. It doesn't change what they believed at the time even though they had that document.

I mean, that's why the Court probably found they were wrong, but we're talking about willfulness now. So with the benefit of some hindsight and

additional research or investigation --

THE COURT: You mean, that you actually did the investigation that Credit One through its previous counsel hadn't done?

MR. FRATKIN: I believe --

THE COURT: In defending the case in front of this Court? Is that what you mean?

MR. FRATKIN: Your Honor, I can't -- I don't know how to respond to that.

THE COURT: Well, one issue here is that Credit One, your client, is required to take principled stands in front of this Court. Mr. Fratkin, there is nobody here who is saying you're not taking principled stands. But Credit One has been here for a long time, and they have their own lawyers, and they have the lawyers that came in front of me, and they have counsel, in-house counsel.

So if you're now saying to me, which you said obliquely I think one time directly, that you now want to change the entire way you defended this case because the whole time Mr. Wood is saying it's not my account, and my mom opened it fraudulently, and you took him to the wall for however long you took him to the wall saying we're accurately reporting it, and now you want to refract it because you, Mr. Fratkin, have

done investigation that maybe somebody else didn't do, but the client had that information the whole time. The client. You are representing the same individual. I have no idea why this case, for instance, hasn't settled. You're sitting here in front of me saying that you now know Mr. Wood didn't open the account.

MR. FRATKIN: Your Honor, accuracy is a defense. If we would prove accuracy, we would have prevailed. But the statute doesn't require accurate reporting or a cause of action. It requires the plaintiff to prove that we conducted an unreasonable investigation. And on this point, we think this is *Safeco*, but -- and we've raised it.

THE COURT: You didn't raise that part of *Safeco*. Credit One did not. That is a Supreme Court case.

MR. FRATKIN: But the point being factually, and I didn't mean to get into the legal argument again, the point being factually Credit One's policies are to require that Mr. Wood submit an identity theft report, and we think that's supported with the CFPB, and we spent the other half of our *Safeco* brief on that. But that was their policy. And so if you're asking why they took the position that he was responsible for the account and why we take the

position, and still do, that the investigation was reasonable on this identity theft issue, we think the law says that unless you get a police report or an identity theft report, that it's okay, it's permissible to continue to report that he's responsible for the account.

And so -- I mean, I don't say that -- I don't think Credit One did anything wrong before. I don't think they did anything wrong continuing the account and taking the position that it was accurate.

We've done some additional research. We have Your Honor's opinion, which certainly is something that went into consideration, and, you know, if the witness -- if our client wants to now take the position that it doesn't believe he owes on the account anymore, and that's the truth, then they ought to be able to say it.

THE COURT: Maybe not without consequence.

MR. FRATKIN: I think our response is they should get impeached with their prior testimony that said they thought he owes the account. That's what we argued in our briefing. If they want to change a position, then there's an impeachment issue. And I fully expect Mr. Bennett to take advantage of it.

But they didn't have all that information all

along and they certainly -- they had the CFPB guidance that said require an identity theft report before you change a credit report.

MR. BENNETT: May I use the court reporter's record here since we have the general counsel to put on the record the fact that familial identity theft is almost impossible to prosecute. It is almost impossible. And I recognize this doesn't have any bearing on this case. But on the record, if I have to deal with Credit One in the future, we will prove that point.

Statistics -- CFPB statistics and the FTC statistics, you cannot -- it is almost impossible to get a police officer to take a police report or prosecute a family member, a familial identity theft, and that's exactly what happened here. But that's also -- there is no CFPB guidance that says require this, and there is significant case law that says you can't impose such a requirement, even if factually there was evidence that that was the reason that the defendant rejected my client's very detailed disputes, including written sworn statement from the mother.

I'd also put on the record, and I apologize, Judge, I did not know of this conversation. I understand Mr. Fratkin was doing his job

investigating. We were unable to get the mother to talk to us. She is still estranged from Mr. Wood. So, if anything, she would be an ally of Credit One.

And while I have this microphone, in the effort to try to get the defendant to settle, when you go through the actual accounts that the mother supposedly would have charged, there's only a hundred and change that were not Credit One imposed fees, interest and other. It was a 300 R account charged off at $700, and only $118 of which this woman apparently used at McDonald's and cigarette stores. So this case should resolve.

But we certainly don't think that there should be any litigation of the question of accuracy at trial. Even if there's a modest probative utility here, it is overwhelmed by the unfair prejudice, and under the Federal Rules of Evidence should be excluded.

THE COURT: All right. Let's turn to -- to the extent we haven't addressed, I want to be sure I cover all aspects of what you've raised because they are being raised in interesting ways.

So your second, No. 2, Mr. Wood is arguing that there should be an exclusion of any evidence all together with respect to the -- that it had an

interpretation of the FCRA defense.

Do the parties think that we have essentially addressed that issue through our willfulness discussion or is there more to it?

MR. BENNETT: I believe we have. In opposition to the motion in limine, the defendant, essentially, effectively concedes that its interrogatory responses in Rule 30(b)(6) testimony would not have provided evidence of that, and it retreats to the position that it doesn't matter, bravely arguing, in part, that the interrogatory answers weren't sworn and thus not useful, and arguing that it's not bound by its 30(b)(6) testimony. And there was still seven more pages that could have been used in the brief.

There was no evidence that the defendant suggests saying, No, no, no, the plaintiff is wrong. There is evidence in the record that there was such an interpretation, and there's not.

THE COURT: Why are you arguing here that you're not bound by your interrogatory answer? I will say --

MR. FRATKIN: I'm just asking for it here, I think.

THE COURT: Listen, you know, Mr. Fratkin,

whatever happened before happened before. You want to rely on the fact that another counsel didn't swear to interrogatories appropriately --

MR. FRATKIN: No.

THE COURT: I don't honestly understand what the heck you're trying to do. It may be too clever by far. So you're going to have to explain to me why it's not.

MR. FRATKIN: It's not that -- you're bound by -- the case law --

THE COURT: What are you getting away from? What aren't you bound from?

MR. FRATKIN: You can contradict your testimony, 30(b)(6) testimony, interrogatory answers, any deposition testimony. I'm not saying we are going to, but you can't -- he's saying we didn't offer enough evidence of any of that, and therefore we can't say anything at trial about our policies -- I'm sorry -- our interpretation of the statute.

So the point was simply that it's just a party admission. The interrogatories are a party admission. They're not sworn. We're probably being too clever, and it's not worth, for me, not worth arguing about it anymore. I think it was just a small point that there is nothing different about these

interrogatories.

THE COURT: But, you know, you are arguing it. So what's going to be different? The whole point is surprise. The whole point is now you're saying we do have a -- you know, we've learned. We're a reasonable company. So we got it wrong for a long time. We argued it wrong for you in front of summary judgment. We don't really like your opinion, but we're going to adhere to it a little bit while we present our evidence in front of you. And so but to do that, we're going to change our theory of the case.

So what is it that you are saying that you're going to change? And if you're not going the change it, then why do I have this position in front of me?

MR. FRATKIN: He brought a motion, as I understand it, that we cannot offer any evidence that we had an interpretation of the FCRA and said that, based on our scant evidence of policies and procedures, that, and other things, that we aren't allowed to offer any evidence that we thought the FCRA required us, for example, to conduct a reasonable investigation.

Under his motion, he says that, and he points to all of this discovery that he thinks binds us to a point where we can't offer any evidence.

THE COURT: So cite the evidence that you are going to offer that either is already on the record or that I can make a finding as to whether or not you're allowed to do it. Why am I in the dark about that? This is a civil trial. There's no surprises here. Because if you surprise, it's prejudicial.

MR. FRATKIN: You asked at the beginning of this -- well, before Mr. Bennett started talking, whether what we had already covered in the *Safeco* argument covered this, too, and the answer, I think, is yes. Everything that I read out loud from Mr. Shutt to Ms. Lanham about the policies and procedures that they had, all that is what would support our position that we can offer evidence of that at trial.

THE COURT: Existing evidence.

MR. FRATKIN: Well, the witness that's here live is not going to read word-for-word for her deposition.

THE COURT: So that's a secondary question. Is everybody going to be here live?

MR. FRATKIN: Ms. Lanham will be here live.

THE COURT: What about Mr. Shutt? You're talking about him an awful lot.

MR. FRATKIN: Mr. Shutt's deposition will be

presented, and I think we're mostly in agreement on Mr. Shutt being able to testify through deposition. I took Mr. Bennett's position to be that -- well, I don't know what the position is, but Mr. Shutt will be here through a deposition.

THE COURT: Is it Shutt (pronounced shoot)? I'm going to try to get it right.

MR. FRATKIN: Shutt (pronounced shut). Mr. Shutt.

THE COURT: All right.

MR. FRATKIN: So certainly, obviously, his evidence will be what he said in his deposition about the policies that he wrote, and how they were disseminated to the rest of the company. How he read *Johnson*, how he read *Saunders*. All that's been designated.

Ms. Lanham will be here live. I don't expect her testimony to be inconsistent with what she testified in her deposition, but, I said this earlier, they didn't ask every single question of her in a deposition that they could have, and so she may expand on her testimony, and she's allowed to do that. And if she says something that Mr. Bennett thinks is inconsistent, then he's got her testimony to impeach her with. So I'm not expecting anything inconsistent.

I'm just trying to address the motion that he's made which says we're not allowed to offer any of that.

The interrogatory answers have not been cited -- have not been -- I don't think Mr. Bennett is using those as evidence in the case. He's not listed that as an exhibit. I mean, they could be used for impeachment, which we wouldn't object to. But I'm not trying to suggest that there's going to be anything inconsistent. I'm just trying to say we think we ought to be able to defend our case with evidence about --

THE COURT: So one of the issues is your brief says you can contradict. So you may just be citing law, but as somebody who doesn't know what your theory of the case is, hadn't heard until now that you intend to say that, oh, it's the mother who opened it because you talked to her, I was presuming you were going to contradict, and it sounds like in some respects you are.

MR. FRATKIN: I think on the accuracy piece, we're taking a different position than what we took earlier. This is a question. This particular motion is about whether we had a policy or procedure in place that interpreted the FCRA. And that's what we raised. And the point about being able to contradict is simply

that you can expand it. You can contradict it. That's all permissible. And so to try to prevent us from putting on any evidence, which is what we took this motion to mean, is not close to what's required or what's allowed.

MR. BENNETT: Judge, we cite deposition testimony from their 30(b)(6) designee, Ms. Lanham, on this question.

THE COURT: Right. You cite that, but what is she the 30(b)(6) -- you said she wasn't. Now you say her "I don't know" is attributable to Credit One.

MR. BENNETT: I'm sorry. I was incorrect, apparently, and we talked before -- during the break that she was the 30(b)(6) deponent, and that Mr. Shutt, we took his deposition as a result of this answer that I'm reading. This is the answer that she gave. And the answer is: Where did Credit One's attorney get the information to ensure that your dispute procedures are compliant with the Fair Credit Reporting Act?

And the answer is: My understanding is through various sources, bankers online. I believe -- I can't think of what specific statutes, cases, regulatory bodies that provide us details on where and how we would comply. That's all of them. I don't

know. That is to name a few, I guess.

And the defendant's position is that it should be able to expand on that. You wouldn't be expanding on it. Expanding would be I went to 15 conferences last year that dealt with the Fair Credit Reporting Act and at trial naming them.

THE COURT: I'm going to interrupt you because I'm getting distracted.

(Addressing Mr. Bouc) It's not the case that you're using your device, sir, in this court in the middle of a hearing?

That's not okay. It's extremely rude. It's improper. We let you bring these devices in for purposes of convenience if we ask about calendar matters.

MR. FRATKIN: We apologize to the Court. We should have said something, Your Honor. And I talked over his apology, if you didn't hear.

THE COURT: Please don't do that again.

MR. BOUC: Yes, Your Honor.

THE COURT: We have court rules that are public that I waive when appropriate.

Sorry. Go ahead. I was distracted.

MR. BENNETT: Sorry.

So to the extent that the Court considered an

answer that said I went to five conferences, and then at trial the witness said the first conference was this, the second conference was the CDIA conference, and that was in February, that's expanding on it. This answer said, This is all I can think of. I don't even know.

And to be able to come here and say, in fact, we did this legal research, and we, you know, whatever. I don't know what the defendant would say. It would be like trying a Virginia General District Court trial with no discovery. But the 30(b)(6) answer was -- and even if the attorney, Mr. Shutt, was the 30(b)(6)

THE COURT: You have to start saying "Shutt" (shut). It offends people when you say their name wrong, and if we get it right now, we'll get it right at trial.

MR. BENNETT: Yes, Judge.

Mr. Shutt doesn't offer much more either. But if the defendant believed that there was other evidence that it was entitled to use, it should have at least identified it now or in response to our motion.

THE COURT: So that has some common sense to it, Mr. Fratkin.

MR. FRATKIN: Your Honor, there is a little confusion over who the 30(b)(6) witnesses were, but it wasn't just Ms. Lanham. It was Ms. Maragos, and then Ms. Chu was also designated for some pieces.

He took the deposition of Mr. Shutt, who is a lawyer.

THE COURT: Well, either he is or he's not. I mean, that's a procedural fact.

MR. FRATKIN: He's a lawyer.

THE COURT: I know. No, no, no. It's either he's a 30(b)(6) deponent or not.

MR. FRATKIN: But they have multiple witnesses that they deposed with evidence about what the bank's procedures were. We also produced hundreds of pages of documents of our procedure manuals in response to discovery requests that says produce all your procedures. And so that's been into evidence, too. And so to suggest that based on a 30(b)(6) -- one 30(b)(6) witness on one point who said she didn't know where there was no further action taken upon --

THE COURT: Because she said she didn't know. You can't argue that there. If she doesn't know -- 30(b)(6)s are binding on a corporation.

MR. FRATKIN: But it's not the only evidence that comes in with respect to what a company did.

It's just evidence that's binding. We have other evidence.

THE COURT: So far I feel as if a good part of nearly every answer you've given me is that, yep, that's not good, and they can impeach us on it. Am I wrong?

MR. FRATKIN: I think you're wrong, Your Honor. She offered other evidence that the Credit Reporting Resource Guidelines are the policies that we go by, and that document was produced. She talked about manuals. A 30(b)(6) witness isn't going to know an answer to every single question, and there was no motion to compel. There was no -- they took other depositions of witnesses and I think were satisfied with the witnesses' testimony, and now we have different witnesses talking about different things, all about the policies and procedures that the bank had in interpreting the FCRA, which has been with them for months.

The Court used a lot of that evidence, too, and now he wants to say we can't use it to defend our willfulness defense when all this evidence was before the Court to make a finding that we were unreasonable.

I'm not -- I don't know what else -- I mean, it's all there, and he's had it all.

MR. BENNETT: Your Honor, with respect to the second motion in limine, this is narrow. This is the *Safeco* objectively reasonable reliance on a particular reading argument. And our position here is there is no evidence that the defendant actually had a reading of the statute. That's different than had a procedure.

There is no evidence the defendant or there's no evidence beyond what I've just read that the defendant actually attempted to learn what was required of it under the Fair Credit Reporting Act. That's our position.

To the extent that the defendant is arguing that it's entitled to procedures or otherwise, that would be our Motion in Limine 3, and I will withdraw that Motion in Limine 3 and object if there's any new evidence at trial because I do think that we have separately -- after this motion was filed and prosecuted and working through objections to a number of the exhibits, I was convinced our position was not fair or correct with respect to objections to some of the procedures.

The defendant may say, This is our procedure. And we had that procedure at least in time that we wouldn't be prejudiced by when it was produced, and so

we would withdraw Motion in Limine 3. But Motion In Limine 2 is this continued dearth of any evidence that the defendant made a reading or interpretation of the Fair Credit Reporting Act obligations.

MR. FRATKIN: Your Honor, we probably are in agreement. That specific issue we believe is for the Court to decide. And so it's not an issue that we think the jury will hear anyway whether Credit One had an objectively reasonable interpretation of the statute. We'll certainly argue that our policies and procedures told us what we thought was the right thing to do.

THE COURT: Right, but he's saying something different. He's saying there's no evidence that you had any reading.

MR. FRATKIN: And that question is only relevant for the Court to decide, not for the jury to hear. If the question is, on the stand, what you think your obligations were under the FCRA in how you report a disputed debt, the witness has already testified. And that's what we would have her testify again, which is we reported as XH. And we will separately, I think, argue that that was not willful. But for a witness to say I think that's objectively reasonable, I don't anticipate a witness saying that.

But she certainly, I think, should be able to testify as to what they did, and we can certainly argue that we think that doesn't rise to the level of willfulness. That's what, I think, the remainder of the trial is about. Take what they did and argue to the jury that it doesn't meet the standard of willfulness.

MR. BENNETT: If -- I'm hesitant to, in any of my cases, to move affirmatively for summary judgment on willfulness because the case law has developed this two-stage analysis. And that second stage, you know, if you have evidence that notwithstanding an objectively unreasonable interpretation, there was significant efforts to comply and testimony or documents about how you comply, I think that it's tougher for us to win, to convince a court you shouldn't let that come in because you should rule on as a matter of law.

There is no such evidence in this case about compliance. The only evidence is the existence of documents. And those documents don't -- the Court has seen them. They don't say much. They are how to greet a customer on the phone or those types of things, but their paper, the defendant will say, Look at this paper. And I'll ridicule that at closing.

I'll say, Look at the paper. Sure. It says nothing. It's two pages that mention this statute.

The question of the presence of a procedure is not relevant to the question of whether there was efforts to comply with the statute other than the circumstantial existence of those documents.

But the legally proper and correct result here will be at the end of the trial if the evidence is as we expect it's going to come in, we will move for a directed verdict because this Court and Judge Payne in a couple of instances has found a willful violation as a matter of law.

The Ninth Circuit has *sua sponte* done so twice when the consumer appealed losses in the *Sa'ad* case and in a case called *Dennis v. BH* against Experian, not only reversed but entered summary judgment.

Other courts have entered summary judgment. The *Reardon v. Closet Maid* case, our case in Pittsburgh, where the question in Judge Gibney in *Dreher* on the part of the decision that was not reversed, the question is if you have an interpretation that the Court finds is not objectively reasonable, this is not like in a criminal case where you have guilty with a certainty, not guilty with a

certainty, and uncertainty. It's the metaphor of you're either pregnant or not pregnant.

If it's not objectively reasonable, the only other reality that can exist is objectively unreasonable. It's a binary question.

So to the extent the Court and the defendant continues to force this decision now, despite my not having moved for it, and the Court finds as a matter of law that its interpretation was not objectively reasonable, the entire willfulness defense should, as a matter of law, be foreclosed. And we get to that point if the defendant attempts to use this kind of evidence to say it had an interpretation. If that interpretation was objectively unreasonable as a matter of law, nothing else matters because the concept of that, the reason it's reckless, is that any normal, reasonable person looking at that statute and its interpretation and acting the way a reasonable company should act, no reasonable company could not have acted without a callousness and recklessness towards its compliance obligations. It's essentially circumstantial evidence comparable to conscience disregard and knowing violations.

With respect to this question that's before us, I think we agree that the defendant does not have

evidence that it actually had a reading, but instead is asking the Court to consider that a pure legal and nonfactual question, which is really saying that *Milbourne* and Daugherty and *Pedro* don't matter because it's the Third Circuit view that you don't look at actual intent.

MR. FRATKIN: I don't think we agree, Your Honor. We're back to *Safeco*, but just to be clear, our position is that you don't have to have evidence of your actual reading of the statute because the company's actions reflect the interpretation of the statute. And that is what Judge Gibney held in *Dreher*. Judge Payne held in *Milbourne* that the company has to have evidence of its reading of the statute. And while we don't think that Judge Payne was correct in requiring that, we offered evidence, which is what we spent the better part of the last couple of hours talking about, we offered evidence of what we believed was an objectively reasonable or not objectively unreasonable reading of the statute.

So we think we have both. But going back to the specific motion in limine, as long as Mr. Bennett agrees that we're allowed to offer evidence about what our policies and procedures are, and that includes Mr. Shutt's testimony that he read statute, he created

policies and procedures based on that, he read Johnson, he read *Saunders*, I think we're on the same page as to what would be admissible for purposes of the jury. The *Safeco* question is totally separate.

MR. BENNETT: To that invitation to agree, we would agree, and we need it to convince the Court to do the unusual thing of allowing instructions or admissibility of the *Johnson* and the *Saunders* case that the witness says he consulted.

MR. FRATKIN: We have that later, I guess, to deal with. Sounds like Mr. Bennett wants the Court to decide the *Safeco* issue also. So maybe we should pause everything and let the Court issue an actual opinion on this.

THE COURT: Well, if we're going to pause, you're going to file a trial brief, and you're going to do it by Wednesday. And I actually think that that's what's going to happen. You've changed your theory of the case. I'm getting bits and pieces of how you're changing it and why. You're raising a new issue of law that you say I have to decide and that I have the power to decide and must decide before the trial goes forward and that you didn't do anything improper by failing to raise it in your willfulness motion for summary judgment.

So you're saying all those things. You're saying them in five different briefs in six different ways. And the plaintiffs then have to respond to that and they respond by making six different arguments, trying to psych out what it is that you are now saying, and what you say you did, and the basis for it, and that's not how civil litigation happens; right?

This is not a case, a circumstance, where parties are not allowed to know what the other side is doing. That's the whole point of discovery. What you do in discovery then helps define the parameters of what you can try.

So if there are additional things like I just ruled that the CDIA, that you can't use it because it's too late, that's how discovery works; right? Because otherwise you'd be having stuff every day. That's how cases work. People become more familiar with them. Somebody finds something. They give it to their counsel. The counsel is obligated to turn it over, but at some point you have to stop and try the case.

So I am concerned that neither of you is telling me exactly what it is you intend to rely on or not. Mr. Bennett, your motions are way too broad.

You're trying to, I guess, preserve positions so that when something comes out in trial, you can object to it. But neither of you is doing a good job of telling me what I should be ruling on except *Safeco* with respect to any particular document or how the motions in limine pertain to them. And so in some respects, I can reserve ruling on all of these things; right? That's not particularly helpful.

And this is what I'm inclined to do. I'll tell you Mr, Fratkin, you have to convince me why you didn't blow your opportunity to say you had a reading of the statute when you moved on summary judgment for willfulness. So that's a primary concern I have.

MR. FRATKIN: I'm sorry to interrupt. Do you mean --

THE COURT: Just let me finish.

MR. FRATKIN: Okay.

THE COURT: So I've told you that you are not doing a good job of convincing me right now. I know there are cases that say in some circumstances you may be able to raise this issue of law. I know you can do a Rule 50 motion. I know that, too. And I'll rule on it if you do it. But we have the issue in front of us now, belatedly, in the fashion you chose and the fashion that your previous counsel didn't choose, and

I want to be sure that whatever you're relying on would be appropriate in any event. That you're not relying on evidence beyond the record that existed prior to July 26, that you're not relying on testimony that maybe you shouldn't be allowed to bring if there's a dispositive issue that you didn't bring earlier on because you raised willfulness. I don't know. Maybe you're allowed to split willfulness and move on one part of it and not another. That's not generally how the Eastern District looks at issues.

We certainly have a local rule about how to raise issues. And I don't think you're saying that this particular issue that you're raising doesn't go to a finding of willfulness because you're saying I have to decide it before willfulness goes to the jury.

So I think I need a trial brief from you about what you think you're doing now and about why you have the procedural basis to do it. And you need to cite the cases and the procedure. As far as I'm concerned, you both are going to file trial briefs, and you're going to incorporate the arguments that you have in your motions in limine. But because the *Safeco* issue is yours, Mr. Fratkin, your trial brief is going to come first. You're going to file it next Wednesday.

MR. FRATKIN: Is the only issue you want --

THE COURT: No. I want to know -- it's a trial brief. I want you to address the issues that you think are left and the evidence that you intend to present with respect to what you think is going to trial and why.

And for your purposes that includes why your *Safeco* defense can be raised procedurally, and why it precludes evidence based on the evidence that you think you have to support it, and why then it narrows down the issues in the manner you think it does with respect to this we're just expediting things because all we have left is willfulness anyhow.

Now, I'm going to take a recess and figure out the timing and exactly what I want you all to address. I know that I have two days on the week of trial, the Monday and Tuesday of trial, which is what day?

MR. FRATKIN: Our trial is Thursday and Friday, the 1st and 2nd.

THE COURT: Right. That's the 29th and 30th. And I may be working around those. So I'm going to take a recess and make sure that my instructions are clear.

Did you want to say something, sir?

MR. BOUC: No.

THE COURT: You know, actions speak, too.

(Recess taken from 4:22 p.m. to 5:05 p.m.)

THE COURT: All right. So I think we are going to proceed along the way I indicated with a little bit of a modification.

So, clearly, one of the issues that we need to address is this *Safeco* issue. And, clearly, Mr. Fratkin, my concern is that you are bringing this motion in a procedurally improper way. Not because maybe it's happened that way in other courts, but because of the way this particular case has unfolded, and you just have to establish that.

So with respect to the other motions in limine that are pending, I do think that you all can probably work it out based on how you think the evidence is going to come in, and what you're going to do and not do. And I think in most of the instances, as I look at my proposed rulings I would have to reserve on how the evidence comes in in many respects in any event depending on what it is exactly you're trying to exclude, and that functionally what has happened in some respects is that you have preserved your objections. But because of my concern about this procedural blip, I am going to order that you all just

put together trial briefs. That you do that not by Wednesday. That you do it by Friday. That I have a sense of what you're bringing and how you're bringing it. So that involves procedural bases. It will help narrow it. Whatever you put in your motions in limine, which will still be pending, explain to me why you think the universe that you've chosen to raise needs to be raised.

And we can have -- if you want a reply to what the other side says, you can do that by the 24th. And then I have open all day the 29th and the 30th to finish this final pretrial conference and to rule on any particular issues. I'm also willing, to the extent things are briefed up, to rule on the papers to the extent I understand what it is that you all are saying.

But with respect to the remaining issues that I have in front of me, many of them I would have to at least decide that -- I'd have to see how some evidence comes in or just narrow down what the objection is itself.

And since we have taken a good part of today looking at the *Safeco* issue and this, I think, the only piece of after-disclosed evidence. Mr. Fratkin, you're not trying to put in anything else in evidence.

MR. FRATKIN: There's one document, Your Honor, that was a re-created letter that was -- I don't know the right word. It was re-created. It was a sample letter that went to Mr. Wood. Based on your ruling on the 2017 CDIA, we're going to withdraw our proffer on that. It's an exhibit.

THE COURT: Right. It's one of the exhibits.

MR. FRATKIN: I'll work with Mr. Bennett to make sure that --

THE COURT: Right. Have you all worked out most -- I presume you've worked out some of the objections that you had briefed up to me in any event; is that right?

MR. BENNETT: Yes, Your Honor. A couple of things. Yes. So I'll brag about that part of it. But no, because if you transitioned into deposition transcripts, for example, I don't think that on my side, I don't think that we gave that meet-and-confer process sufficient time. And so I will work over the next week with defense counsel to try and eliminate the deposition disputes. You know, you go back and look at these things three and four times, and you think how silly your argument was. In theory I made silly arguments. And so some of these I would withdraw the depositions.

I think the exhibits are pretty well narrowed, and some of them will fall one way or the other based on these other decisions.

A couple of the motions in limine I expect that we will formally withdraw unless the Court wants to rule on them now, like the mistake No. 5. We would be withdrawing these rather than --

THE COURT: Well, you can withdraw anything that you think is appropriate at this point.

MR. BENNETT: Well, we would withdraw Document 125 is the memo, but the No. 5, any suggestion or evidence the defendant's reporting of the Credit One bank account at issue in this lawsuit was a mistake or error, and I've already withdrawn No. 3 of the omnibus motion, and I would also -- I will withdraw No. 4, which is any suggestion or evidence the defendant devoted or allocated any resources to FCRA compliance, and I will fight that battle with evidentiary objections and/or impeachment. It makes more sense.

I think you have the sum total of the evidence that we think exists here, but -- and I think the others are already on the table in different fashions for the Court's consideration or for the parties' resolution.

THE COURT: All right. So that's four and five, and you already withdrew three.

MR. BENNETT: So Defendant's Exhibit 18, the defendant, I think, is withdrawing.

THE COURT: That's the document?

MR. FRATKIN: It's an after-produced exhibit.

THE COURT: Okay. All right.

Okay. So I will proceed in that fashion. I'll want essentially your trial briefs, how it is that you think the cases are going forward.

Is it the case, Mr. Bennett, you're saying you're not objecting to their now saying that the mother opened the account, but you would be objecting to it going toward a reasonable belief toward willfulness? I'm trying to understand your objection.

MR. BENNETT: My original understanding before we started today and more fortified before a conversation we had about a week ago was that the defendant still continued to re-litigate each of the issues; the reasonableness of the investigation, the willfulness or objectively reasonableness, and the accuracy.

We had a conversation where I said, you know, if you want to continue to argue that -- there was an Equifax lawyer named Mara McRae. The defense that's

the hardest one to deal with is the Mara McRae defense, which is, Wow, it was a mistake. We really didn't want this to happen, but you continue to say it was never a mistake.

That conversation, as of that point, I understood last week that the defendant was still continuing to assert the right to defend itself and say accuracy.

I'm going to wait when I read the trial brief myself to fully understand the too used distinction for how it would play out as to willfulness otherwise.

That probably doesn't answer the Court's question, but it's my own confusion that's causing that.

THE COURT: Right. Well, it may be the fact that you're expressing the same concern I have, which is why I want a trial brief. I'm not sure where you think on behalf of your client the lines merge.

MR. FRATKIN: I'm sorry. The last --

THE COURT: I don't understand exactly where you think on behalf of your client the lines merge and diverge with respect to the evidence that you want to use for what purpose.

MR. FRATKIN: Well, I'll say it, but we'll say it in more detail in the trial brief.

The evidence that the bank had at the time it did the investigation, its belief was that Mr. Wood opened the account. And today after, you know, additional investigation and the Court's ruling and everything else I said, it now believes that he did not open the account. The latter that now believes he did not open the account is this Mara McRae defense that Mr. Bennett talked about, which is essentially what he said.

The former evidence that at the time we investigated we believed that he opened the account was part of our investigation and supports our argument that we weren't being willful, in fact we weren't knowingly violating the statute either because we had a belief at the time that he opened the account. That's the distinction. We can put that out in our trial brief, but those are the two positions. One at the time we investigated and today.

THE COURT: Right. So you can put that out in your trial brief. The way it has come forward today, you've now articulated it, but I think it's going to be better put forward, especially given my concern about whether it functionally amounts to a second summary judgment motion that should have been brought.

MR. FRATKIN: Understood, but we're not planning on -- other than offering that evidence about bringing any legal argument other than --

THE COURT: I know you're not, but you plan on arguing it to be legally either in this motion or through Rule 50. And so I want to be clear. You are saying that this reasonable belief -- I know you're saying the jury can find it, but if I find that for some reason that you either can't bring it procedurally or that you haven't established that you had a not objectively reasonable or not objectively unreasonable reading of the statute, I think it changes what the jury hears.

MR. FRATKIN: Your Honor, the issue of accuracy --

THE COURT: Yes. I know what you're saying. I just want to be sure. You're right. You're right. So I'm taking back a little bit of what I just said, which is obviously some of the factual stuff will go forward in the same fashion, but I want to be sure I understand exactly what your legal theory is, and you have to concede at the very least that you are coming in today with a very different presentation than you have for the past very long time in this court. Correct?

MR. FRATKIN: There's two new things we raised today. One is the position now that we believe we didn't have.

THE COURT: That's pretty big, Mr. Fratkin. So that's it. Just that alone.

MR. FRATKIN: And then the second issue that's new is the *Safeco* defense that's entirely unrelated to whether he opened the account or not. That's an entirely separate issue. That goes to the reasonableness of the investigation and whether we're willful. So we're not trying to touch the accuracy issue that the Court already decided in the sense that we're not going to raise -- re-raise the issue of whether he opened the account or not.

THE COURT: That's why I want a trial brief.

MR. FRATKIN: Those are the only two. I get that they're big, but those are the two new issues.

THE COURT: They're big. Mr. Fratkin, they're just big.

MR. FRATKIN: I understand.

THE COURT: So, you know what? You know, they're big. And I want a clear presentation of whatever the heck Credit One is going to do because while you are clarifying it over the time you have taken the case, I still don't think with, say, for

instance, today that you're saying your position is different with respect to whether who opened the account. You're saying that three weeks before trial. I don't think that Credit One has been clear about the positions that it is taking in front of this Court. And so whether it's just two new things, Credit One has not been clear for a long period of time in front of this Court, and so I am ordering that you clarify it --

MR. FRATKIN: Yes, Your Honor.

THE COURT: -- in writing.

MR. FRATKIN: Yes, Your Honor.

I didn't mean to suggest it was just two new things. I just wanted to be on the record that it is two things. That's all I was trying to get across. But understood, Your Honor.

THE COURT: So we will have a hearing starting at 10:30 on the 29th. And that will be to the extent I haven't issued written opinions on any of the motions in limine or haven't responded to anything that you all think I need to based on your trial briefs, we will just finish up this final pretrial conference, and we'll go from there.

If you all, for instance, have narrowed down the things you're objecting to or whatever you're

presenting, so on the 24th also you can submit to me an updated final pretrial order. That way I have time to look at it before the 29th, and I'm not responding to things that you're giving me on the fly. All right?

So I'm actually hesitant to suggest this, but I actually am not just going to suggest it. I'm going to order it. I know that Judge Novak is available on the 17th and the 19th of next week for settlement, and I am ordering that you all go on one of those days and give one final shot at settlement.

I know you've gone. I know that you now have filed a fair amount of papers with respect to the pretrial issue. I am convinced this case has become the tail wagging the dog. It is actually a fairly simple case. The problem is that it has not been presented in a simple fashion at all. And so that's why we're going to get ready for trial.

If you settle, you settle. If you don't settle, you don't settle. But the amount of resources that you are spending on this I think warrants one more serious try based on the record that has been presented to me over the time that this case has been pending. So you must attend, and your clients must attend. And you can notify me which day it is if for

some reason Judge Novak doesn't. But it is not optional. It is part of the order that I'm issuing today.

All right? Am I unclear about anything?

MR. BENNETT: Your Honor, the only thing I would be unclear about is a person with authority at the settlement conference. I understand we have the general counsel here, and he's obviously high up, but I understand he would not have authority to settle. So I don't know how the Court addresses that issue or deals with that issue or doesn't deal with that issue.

THE COURT: Well, who has authority to settle your case, Mr. Fratkin? You can ask your general counsel.

MR. FRATKIN: Do you mind if I go ask him?

THE COURT: No, go ask him.

MR. FRATKIN: Do you mind if we step out for a second, Your Honor?

THE COURT: No, of course.

(Mr. Fratkin and Mr. Bouc are out of the courtroom.)

MR. BENNETT: If the Court really wants to inflict burden on a party, Judge Novak on a Friday afternoon, because, particularly with Liz, he has -- it's probably three that they've stayed until like

9:00 or 10:00 at night. Of course, it inflicts burden on Judge Novak, too.

THE COURT: Yes. Well, that's up to you guys. He just gave me two days.

Just so you all know, I have my clerk checking to see if Judge Novak is here now and you all can go and resolve all of these issues with him as far as scheduling. I just don't want to send you down there if he's in a settlement conference or teaching or something.

MR. BENNETT: He's gotten very good at settlement conferences. It's like the *Milbourne* case, I was telling Heidi. I said I can't believe I settled the case. Because I settled it that night with Judge Novak, and then came back in and told Judge Payne how much, and he said, "That's all?" So --

THE COURT: Well, you can tell them Judge Novak is not there, but his clerk is, and if there's an issue -- well, I'll tell them.

(Mr. Fratkin and Mr. Bouc are back in the courtroom.)

THE COURT: I was just speaking to counsel because it's possible for you all to go down to Judge Novak now, although he's not there, and see what the availability would be.

But what do you have to report to me?

MR. FRATKIN: So there's not a clear answer as to who the person with full settlement authority is, but if the Court orders that someone with full settlement authority is to be there, then we'll make sure the person is there, whether it's Bouc or the CFO or someone else, they will be there. We don't have the answer right now.

THE COURT: Have you already had a settlement conference? Who showed up then?

MR. FRATKIN: Pardon?

THE COURT: Who showed up then?

MR. FRATKIN: Mr. Bouc.

So if the Court orders someone with full settlement authority shows up for where we are now, then we'll do it.

THE COURT: That's a surprising answer. I'll be honest with you. So I don't understand why your general counsel was the appropriate person before. Doesn't Judge Novak always order it?

MR. FRATKIN: Well, I wasn't there, obviously, but my understanding was he had full settlement authority then. We don't know right know whether he has full settlement authority because the demands have gone up.

My understanding usually is the settlement authority is based on where you are in the demands. I mean, in some cases you have to go to the Board of Directors, and I don't know all the ins and outs of this company and where you are in terms of what the reasonable expectation of how big the demand is, how high you go up, but I don't think in every case we typically have the CFO or the CEO show up.

So I don't know one way or the other because I wasn't here for the settlement conference whether he didn't have it, but I don't know who has it right now, and so we have to have a discussion as to who the right person is.

THE COURT: So what is today? Thursday?

Well, Judge Novak's clerk is here. I will say, sir, I served in general counsel's office in a company, and so I am aware that often the business person has a different perspective than the counsel does. And so I do think it's important to contact a business person with respect to this. It is somebody with full settlement authority. And so I guess you all are going to have to address that to some degree. It always is.

You can go down and speak with Judge Novak's clerk because what I was starting to say is that I

checked to see if he is here. He's not. But his clerk indicates that she might be able to at least give you some guidance on it, and at least get a day on the books, and you all at least won't have any dispute if you figure it out today and/or tomorrow about who that person is that you actually do have somebody there with full settlement authority.

But that's really all Judge Novak's bailiwick. I know what I did when I was a magistrate judge, and I know what his order says, and I don't think it's tremendously different from what I did as a magistrate judge.

But it is problematic, obviously, if there is -- the biggest problem is that the parties don't agree that the person who is there has real settlement authority. And so that's really what I'd like you to work out in front of him. Okay?

MR. FRATKIN: Yes, ma'am.

THE COURT: So please go down and at least get some parameters from Judge Novak's clerk. I know he will make himself available telephonically if there's something you have to address early tomorrow, I'm sure, and then you can pick which day it is that you want next week, either the 17th or the 19th, and the rest of my order will remain in place. All right?

MR. BENNETT: Yes, Judge.

THE COURT: Okay. So we'll take a recess. A recess from this case is what I meant. We are adjourning for today. Pardon me.

(The proceedings were adjourned at 5:35 p.m.)

I, Diane J. Daffron, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/

_____ _____

DIANE J. DAFFRON, RPR, CCR DATE